

1 FEDERAL TRADE COMMISSION

2 I N D E X (PUBLIC RECORD)

3

4 WITNESS: DIRECT CROSS REDIRECT RECROSS

5 Dritsas 4612 4838 4892 4911

6

7 EXHIBITS FOR ID IN EVID

8 Commission

9 None

10 Schering

11 SPX 2264 4793

12 SPX 2266 4793

13 SPX 2267 4793

14 Upsher

15 Number 380 4764

16 Number 410 4774

17 Number 626 4714

18 Number 822 4801

19 Number 837 4820

20 Number 839 4799

21 Number 1549 4691

22 Number 1551 4754

23

24

25

For The Record, Inc.  
Waldorf, Maryland  
(301) 870-8025

1	OTHER EXHIBITS REFERENCED	PAGE
2	Commission	
3	CX 19	4839
4	CX 21	4853
5	CX 24	4864
6	CX 138	4866
7	CX 255	4855
8	CX 256	4860
9	CX 265	4863
10	CX 740	4687
11	CX 929	4879
12	CX 991	4882
13	CX 992	4882
14	CX 1100	4843
15	CX 1586	4823
16	Schering	
17	None	
18	Upsher	
19	USX 386	4801
20	USX 425	4768
21	USX 440	4804
22	USX 480	4759
23	USX 484	4764
24	USX 498	4748
25	USX 591	4811

For The Record, Inc.  
Waldorf, Maryland  
(301) 870-8025

1	Upsher	
2	USX 619	4707
3	USX 630	4737
4	USX 634	4805
5	USX 635	4808
6	USX 643	4740
7	USX 660	4814
8	USX 1005	4794
9	USX 1006	4794
10	USX 1556	4826
11	USX 1557	4827
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

For The Record, Inc.  
Waldorf, Maryland  
(301) 870-8025

## FEDERAL TRADE COMMISSION

In the Matter of: )  
SCHERING-PLOUGH CORPORATION, )  
a corporation, )  
and )  
UPSHER-SMITH LABORATORIES, ) File No. D09297  
a corporation, )  
and )  
AMERICAN HOME PRODUCTS, )  
a corporation. )  
-----)

Thursday, February 21, 2002

9:30 a.m.

TRIAL VOLUME 20

PART 1

PUBLIC RECORD

BEFORE THE HONORABLE D. MICHAEL CHAPPELL

Administrative Law Judge

Federal Trade Commission

600 Pennsylvania Avenue, N.W.

Washington, D.C.

Reported by: Susanne Bergling, RMR

For The Record, Inc.  
Waldorf, Maryland  
(301) 870-8025

1 APPEARANCES:

2

3 ON BEHALF OF THE FEDERAL TRADE COMMISSION:

4 KAREN G. BOKAT, Attorney

5 PHILIP EISENSTAT, Attorney

6 JEROD KLEIN, Attorney

7 Federal Trade Commission

8 601 Pennsylvania Avenue, N.W.

9 Washington, D.C. 20580

10 (202) 326-2912

11

12

13 ON BEHALF OF SCHERING-PLOUGH CORPORATION:

14 JOHN W. NIELDS, Attorney

15 LAURA S. SHORES, Attorney

16 MARC G. SCHILDKRAUT, Attorney

17 Howrey, Simon, Arnold & White

18 1299 Pennsylvania Avenue, N.W.

19 Washington, D.C. 20004-2402

20 (202) 783-0800

21

22

23

24

25

For The Record, Inc.  
Waldorf, Maryland  
(301) 870-8025

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

ON BEHALF OF UPSHER-SMITH LABORATORIES:

ROBERT D. PAUL, Attorney  
J. MARK GIDLEY, Attorney  
CHRISTOPHER M. CURRAN, Attorney  
RAJEEV MALIK, Attorney  
White & Case, LLP  
601 Thirteenth Street, N.W.  
Suite 600 South  
Washington, D.C. 20005-3805  
(202) 626-3610

ON BEHALF OF AMERICAN HOME PRODUCTS:

ROBERT L. JONES, Attorney  
Arnold & Porter  
555 Twelfth Street, N.W.  
Washington, D.C. 20004-1206  
(202) 942-5667

For The Record, Inc.  
Waldorf, Maryland  
(301) 870-8025

1 P R O C E E D I N G S

2 - - - - -

3 JUDGE CHAPPELL: Okay, let's reconvene docket  
4 9297.

5 Mr. Nields?

6 MR. NIELDS: Your Honor, may I just raise one  
7 housekeeping matter before we begin?

8 JUDGE CHAPPELL: What kind of matter?

9 MR. NIELDS: Housekeeping.

10 JUDGE CHAPPELL: I thought you said "has to  
11 be," so -- okay.

12 MR. NIELDS: I neglected, Your Honor, yesterday  
13 at the end of Mr. Lauda's testimony to re-offer the two  
14 exhibits that I'd offered in his direct and we had  
15 agreed we would wait until cross. Now, Mr. Eisenstat's  
16 not here, and I think in fairness, in case he has an  
17 objection, we shouldn't actually do it until he is  
18 here, but I just wanted to make it clear that we were  
19 going to re-offer those two exhibits as we had  
20 indicated that we would.

21 They are demonstratives, and they can be  
22 considered by the trier of fact whether they are in  
23 evidence or not, and that's the --

24 JUDGE CHAPPELL: Right, and that's the way I  
25 have admitted those kind of exhibits in this trial

1     since the beginning, for identification purposes, as  
2     merely -- like you said, they're demonstrative aids  
3     relied upon by an expert. With that clarification,  
4     re-offer them when Mr. Eisenstat's around or have  
5     someone contact him, and we'll take it from there.

6             MR. NIELDS: Okay, that's fine, that will be  
7     acceptable to us, just to treat them the way the Court  
8     has treated the other ones.

9             JUDGE CHAPPELL: Since he had a conditional  
10    objection, as you recall, he was going to reconsider  
11    after the cross.

12            MR. NIELDS: Yes.

13            JUDGE CHAPPELL: So, just let me know after you  
14    talk to him.

15            MR. NIELDS: Thank you, Your Honor.

16            JUDGE CHAPPELL: Mr. Curran?

17            MR. CURRAN: Your Honor, as promised, we  
18    anticipate calling six witnesses today and tomorrow,  
19    the first five of whom are Upsher-Smith employees flown  
20    in specially from Minnesota, the first of whom, who we  
21    would like to offer to the stand at this time, is  
22    Phillip Dritsas, who's the vice president of sales and  
23    marketing at Upsher-Smith, and Mr. Gidley, whom you  
24    know, will conduct this examination.

25            JUDGE CHAPPELL: Thank you, Mr. Curran.



1 (Discussion off the record.)

2 JUDGE CHAPPELL: Sir, raise your right hand.

3 Whereupon--

4 PHILLIP W. DRITSAS

5 a witness, called for examination, having been first

6 duly sworn, was examined and testified as follows:

7 JUDGE CHAPPELL: Thank you, have a seat.

8 State your full name for the record, please.

9 THE WITNESS: Phillip William Dritsas.

10 JUDGE CHAPPELL: Thanks.

11 DIRECT EXAMINATION

12 BY MR. GIDLEY:

13 Q. Good morning, Mr. Dritsas.

14 Sir, are you currently employed by

15 Upsher-Smith?

16 A. Yes.

17 Q. In what capacity?

18 A. I am the vice president of sales and marketing.

19 Q. I'd like to cover with you a little bit of your  
20 employment and educational background. Let me start  
21 with your educational background.

22 Prior to entering the work force, did you  
23 attend college?

24 A. Yes, I did.

25 Q. And did you obtain a degree?

For The Record, Inc.  
Waldorf, Maryland  
(301) 870-8025

1 A. I did.

2 Q. And what year, sir?

3 A. 1981.

4 Q. And what sort of degree?

5 A. I have a Bachelor of Arts degree in speech and  
6 fine arts.

7 Q. All right, sir. And what's the first position  
8 you accepted at Upsher-Smith?

9 A. I was a telephone sales trainee.

10 Q. And what year was that?

11 A. That was 1983.

12 Q. And what were your responsibilities in 1983 at  
13 Upsher-Smith in that capacity?

14 A. Well, primarily to call retail customers and  
15 introduce who Upsher-Smith was so that we could sell  
16 our products.

17 Q. Give me a feel for how large Upsher-Smith was  
18 in 1983, sir.

19 A. We had about \$4 million in sale, and I believe  
20 I was the 45th employee hired.

21 Q. How many people worked in the sales function at  
22 that time, approximately?

23 A. I was the fifth hired.

24 Q. What's the next position you held within  
25 Upsher-Smith?

1           A. I was then promoted to telephone sales  
2 supervisor.

3           Q. And when was that?

4           A. That was January of 1984.

5           Q. And what did you do in that capacity?

6           A. Well, I oversaw the telephone sales area and  
7 helped coaching and training.

8           Q. All right. And what's the next position that  
9 you held within Upsher-Smith?

10          A. After that, I was promoted to the assistant  
11 sales manager.

12          Q. What year was that, sir?

13          A. That was roughly 1985.

14          Q. And what were your responsibilities generally  
15 in that capacity?

16          A. Similar to the other things, and in addition to  
17 that, we started a small national account department.

18          Q. What's the next position that you achieved at  
19 Upsher-Smith?

20          A. After that, I was promoted to the sales  
21 manager.

22          Q. And what year?

23          A. That was about a year and a half later.

24          Q. So, that would be 1986?

25          A. Yes.

1           Q. And what were your responsibilities as sales  
2 manager in 1986 for the company?

3           A. Similar responsibilities. In addition to that,  
4 overseeing the consumer sales.

5           Q. When you say "consumer sales," what does that  
6 mean in this context?

7           A. There were a couple of products that we had,  
8 suppository products.

9           Q. These were sold directly to consumers, is that  
10 what you mean?

11          A. They were sold into drugstores out front.

12          Q. I see. And what's the next position you held  
13 at Upsher-Smith?

14          A. I was made the national sales manager after  
15 that.

16          Q. And I'm sorry, when was that?

17          A. That was about four months later.

18          Q. 1986-'87, is that time period about right?

19          A. Yes.

20          Q. All right. And what's the next position that  
21 you held at Upsher-Smith?

22          A. After that, I was promoted to the director of  
23 sales.

24          Q. And when was that, approximately?

25          A. That was in the early nineties, '91-'92.

1           Q. And just to give us a feel, about how large was  
2 the company in terms of sales, in terms of the sales  
3 department, et cetera, in that time period?

4           A. In the early nineties, we were close to \$30  
5 million in sales. The sales department had about 12  
6 telephone salespeople, and we had two or three national  
7 account reps.

8           JUDGE CHAPPELL: I do have my realtime  
9 transcript working, so in the event someone objects to  
10 a question, I can now carefully review the question.

11           You may proceed.

12           MR. GIDLEY: Very good.

13           BY MR. GIDLEY:

14           Q. Sir, in your industry, in the pharmaceutical  
15 industry, are you familiar with the concept of  
16 detailing?

17           A. Yes.

18           Q. Can you tell the Court what detailing is in the  
19 pharmaceutical industry?

20           A. Well, in the pharmaceutical industry, detailing  
21 really involves talking to a physician, most commonly  
22 face to face. These are the representatives that have  
23 a car, they go out in the territory, and then they  
24 canvas the doctors' offices.

25           Q. And they don't -- do they typically have

1 offices or do they typically spend their time in the  
2 field?

3 A. They spend their time in the field.

4 Q. And in the early 1990s, did Upsher-Smith have  
5 field sales reps or detail people?

6 A. No.

7 Q. So, your marketing was done by what means in  
8 this time period?

9 A. Well, primarily through direct mail, and then  
10 we would call the pharmacists and physicians over the  
11 phone, and then we did have one or two national account  
12 people who would go and call on our wholesaler and  
13 chain headquarters.

14 Q. And could you give the Court some examples of  
15 what national accounts would be in the early to  
16 mid-nineties for Upsher-Smith?

17 A. Walgreens, McKesson, Bergen, wholesalers and  
18 chain accounts, managed care accounts, PBMs.

19 Q. And McKesson and Bergen, what sorts of firms  
20 are they?

21 A. McKesson and Bergen are wholesalers.

22 Q. And a PBM is what, sir?

23 A. A pharmacy benefit manager.

24 Q. And what would be an example?

25 A. Well, Merck-Medco is a pharmacy benefit manager

1 with the mail order service; Pacificare.

2 Q. I want to take you now to the time period  
3 that's more relevant to the instant litigation, the  
4 1995-1996-1997 time period.

5 On January 1, 1997, do you recall what your  
6 title was at Upsher-Smith?

7 A. I was vice president of sales and marketing.

8 Q. And what were your responsibilities in that  
9 capacity, sir?

10 A. My job was to oversee the marketing and sales  
11 functions for the company.

12 Q. What were some of the products that you were  
13 selling and marketing in January of 1997?

14 A. Well, generally speaking, we have  
15 cardiovascular products, and within the cardiovascular  
16 products, there were products like Klor Con, for  
17 example, the powder, effervescent, 8 and 10, and those  
18 are for hypertension. They don't treat hypertension,  
19 but patients who are hypertensive are usually given a  
20 diuretic, and it's a potassium supplement.

21 In addition to that, there are other drugs that  
22 we had that were lipid-lowering drugs, and -- Niacor,  
23 which is our immediate release niacin indicated for  
24 lowering cholesterol would be an example of that.  
25 Prevalite, which is our bile acid sequestrant, is

1 another example. And then we have a dietary supplement  
2 for which we have a patented formulation, and that,  
3 too, has been used in treatment of cholesterol.

4 Q. What was the name of the dietary supplement  
5 that you just referred to?

6 A. Slo-Niacin.

7 Q. And you just mentioned Prevalite, and I believe  
8 the phrase you used was "bile acid sequestrant." Is  
9 that correct?

10 A. That's correct.

11 Q. Could you tell the Court what a bile acid  
12 sequestrant does?

13 A. Well, it's something that you drink. You mix  
14 it in with water and you drink it, and it lowers  
15 cholesterol. It removes cholesterol from the gut.

16 Q. Now, on January 1, 1997, what was the  
17 approximate size of Upsher-Smith in terms of the sales  
18 force that Upsher-Smith had at that time?

19 A. At that time, we had grown to about 20  
20 telephone salespeople. We had about eight national  
21 account people. I had four marketing people. And then  
22 I had some service support people as well to do our  
23 direct mail programs and some other areas.

24 Q. Did you have a field sales force or detail  
25 force at that time?



1           A. Not in 1997.

2           Q. And for the year ended December 31, 1996, what  
3           were the approximate sales of Upsher-Smith at this  
4           time?

5           A. I think about \$35 million.

6           Q. And what were the top selling products in the  
7           year 1996 for the company?

8           A. The top selling products would have been the  
9           Klor Con powder, effervescent, Klor Con 8 and Klor Con  
10          10.

11          Q. Other than the Klor Con product line, what  
12          other product lines were strong sellers in 1996, if  
13          any?

14          A. Well, the niacin. We also had -- the niacin  
15          and Klor Con products were the ones that I recall  
16          selling the most.

17          Q. Now, the sales figure you just gave me, where  
18          did that refer to the sales, U.S. sales?

19          A. Yes, we only sell in the United States.

20          Q. All right. Did you have any sales force or  
21          effort overseas in 1997?

22          A. No, we did not.

23          Q. Now, in the spring of 1997, how would you  
24          characterize Upsher-Smith in the context of the  
25          pharmaceutical industry? Where does it fit in?

1           A. Well, really, we're a -- in the spring of 1997,  
2     you would think of us as a relatively small  
3     pharmaceutical company I guess compared to who we  
4     compete with, but we have branded generic products.  
5     So, the good news for us is, for example, when I first  
6     started in '83, we launched our Klor Con powder, and  
7     that was the first generically priced potassium powder  
8     that was available, and a lot of the patients who were  
9     taking potassium were older, some of whom were on fixed  
10    incomes.

11           And it was similar also with our effervescent.  
12    We were the first company to come out with a low-cost  
13    alternative in the wax matrix tablets as well. So,  
14    while we were small and we weren't coming out with  
15    innovative new molecular entities, we were coming out  
16    with economical products that we branded. And so we  
17    call it a branded generic, and we're a niche market  
18    player.

19           Q. Now, despite your relatively small size, were  
20    you able to capture significant sales in the product  
21    areas that you targeted?

22           A. Absolutely.

23           Q. What would be an example in the spring of 1997?

24           A. Klor Con was a great example in our powder and  
25    effervescent and 8 and 10.

1           Q. You mentioned earlier telephone sales reps.  
2           Could you describe for the Court how a telephone sales  
3           rep would make a sale or attempt to drive the sales of  
4           Klor Con in this time period?

5           A. Well, there were a number of ways. They were  
6           all trained to talk to physicians, so they could call  
7           doctors and they could talk about our products. And  
8           with a branded generic, you can ask the physician to  
9           write for your brand, Klor Con. And they would also  
10          call the pharmacies and then sell our products into the  
11          independent pharmacies.

12          Q. What firms were you competing against in 1997  
13          in the sale of potassium?

14          A. Oh, we were competing with a number of firms,  
15          and I probably couldn't list them all, but Abbott,  
16          Ciba-Geigy, Ethex, Bajmar, Alra, a number that -- I  
17          just can't remember all of them. Of course, we were  
18          competing also with the Schering product on the K-Dur  
19          10 and 20.

20          Q. And in the 1996-'97 time period, how did you  
21          compete against the K-Dur product?

22          A. Well, we would talk to pharmacists about the  
23          economics of two 10s for one 20 and so they could make  
24          a therapeutic substitution on that product. Then we  
25          would also talk to the managed care organizations, and

1 we would tell them about, again, the economics of the  
2 two 10s for one 20. And we got a lot of success with  
3 it.

4 The K-Dur product, the 20 mEq product, is  
5 rather large, and so a lot of the patients in reality  
6 break it in half anyway, and so our rationale was that  
7 they could save a lot of money by just taking two 10s.

8 Q. Your product of 10 mEq tablet was called what,  
9 sir?

10 A. Klor Con 10.

11 Q. And was Klor Con 10 therapeutically equivalent  
12 with K-Dur 20?

13 A. Yes.

14 Q. What reception did you receive with doctors and  
15 pharmacists through your telephone sales efforts in  
16 this time period?

17 A. Well, we had good receptivity to it. There  
18 were -- now, again, the number of doctors that we could  
19 reach was fairly limited given our size, but when we  
20 spoke with the doctors, almost all doctors could relate  
21 to some patients who either needed to save money or  
22 didn't like the size of the tablet, and so they were  
23 receptive to the idea of using two 10s.

24 The pharmacists were usually very receptive,  
25 too. A lot of the prescriptions were written open, and

1     so they would receive a prescription from a physician  
2     that would simply say, for example, "KCl 20  
3     milliequivalents Q daily," and so then it was up to the  
4     pharmacist to use whatever -- whatever they wanted, and  
5     they would often use our product because of the  
6     economics.

7           Q.   And these open prescriptions, was that common  
8     in 1997?

9           A.   Yes.

10          Q.   I want to talk about the physical size of the  
11     products.  How did the Klor Con -- strike that.

12               How did the Klor Con 10 wax matrix tablet  
13     compare physically with the K-Dur 20 tablet?

14          A.   Well, the Klor Con wax matrix is about the same  
15     size.  If you broke a 20 mEq tablet in half, it's  
16     roughly the same size, but the shape of the Klor Con 10  
17     is much more conducive for swallowing.  It's round.  
18     So, in other words, it's not bulky with any rough  
19     edges.  And it's aqueous coated, so, you know, it would  
20     be a good alternative if you had a patient who was  
21     complaining about swallowing a big tablet.

22          Q.   Can you tell the Court a little bit about the  
23     patient profile of the typical hypokalemic that would  
24     be taking potassium supplementation?

25          A.   Well, most of the patients are hypertensive, as

1 I mentioned, to begin with, and so they tend --  
2 demographically, they tend to skew older. Many of  
3 them -- what we found is most of the patients who are  
4 on potassium are also on as many as seven or eight  
5 other prescription products at the same time. So, they  
6 might be treated for a number of conditions, many of  
7 which might be cardiovascular related.

8 Q. My own definition of "older" keeps changing  
9 with the years. Could you be a little more specific  
10 about the average age of the patients that take this  
11 drug?

12 MS. BOKAT: Objection, Your Honor. I don't  
13 think there's been any foundation laid that this  
14 gentleman knows about the patients who take potassium  
15 chloride.

16 MR. GIDLEY: I'm happy to lay a foundation,  
17 Your Honor.

18 JUDGE CHAPPELL: Well, the Federal Rules of  
19 Evidence allow opinions from lay witnesses, but they do  
20 not allow an opinion that relies on technical  
21 knowledge. That way, you don't get around the rule of  
22 providing expert discovery.

23 So, if you are going to ask him something that  
24 a normal person would know by observation, I'll allow  
25 it. I'll sustain the objection until I hear a better

1 foundation.

2 MR. GIDLEY: And just so we're clear, the  
3 foundation I'm going to lay is his own knowledge as the  
4 national director of sales selling this product, what  
5 his understanding was of who his customers were.

6 JUDGE CHAPPELL: And you're not offering a  
7 medical opinion here?

8 MR. GIDLEY: Absolutely not.

9 JUDGE CHAPPELL: Okay.

10 BY MR. GIDLEY:

11 Q. Mr. Dritsas, how long have you been with  
12 Upsher-Smith?

13 A. Nineteen years.

14 Q. And how many years have you had some  
15 responsibility or involvement with the sale of  
16 potassium products?

17 A. Nineteen years.

18 Q. And sir, in those 19 years, have you worked on  
19 finetuning marketing messages for doctors with respect  
20 to potassium products?

21 A. Yes.

22 Q. Have you worked on marketing messages with  
23 respect to pharmacists with respect to potassium  
24 products?

25 A. Yes.

1 Q. Have you gained an understanding and  
2 familiarity with the indications and side effects of  
3 potassium products?

4 A. Yes.

5 Q. In your capacity in various sales roles, have  
6 you gained an understanding of the Klor Con 10 and 8  
7 wax matrix product lines?

8 A. Yes.

9 Q. Are you familiar with the physical  
10 characteristics of those products?

11 A. Yes.

12 Q. Are you familiar with the kinds of patients  
13 that those products typically would be prescribed for?

14 A. Yes.

15 Q. Have you geared marketing messages so that  
16 doctors will prescribe your product rather than another  
17 product?

18 A. Yes.

19 Q. Now, in the context of working on marketing  
20 messages and your own product familiarity, I want to  
21 ask you just a few questions.

22 As for the typical hypertensive patient, can  
23 you give me a general age range that you understand  
24 would be taking a potassium supplement?

25 A. Well, the physicians tell us that many of their



1 patients are 65 and over that are on potassium  
2 products. That wouldn't preclude a younger person from  
3 being on that. It's just when we talk about potassium  
4 with them, this is the type of patient that they're  
5 thinking about, and most of their prescriptions they  
6 tell us are written for that age range, if you will.

7 MS. BOKAT: Objection, Your Honor, I move to  
8 strike the last answer as hearsay about what the  
9 physicians told them.

10 MR. GIDLEY: Your Honor, I'm not offering it  
11 for the truth of the matter asserted. I'm offering it  
12 for the state of mind of the marketing department in  
13 gearing their marketing messages to drive sales,  
14 something this witness did for 19 years.

15 JUDGE CHAPPELL: I'll overrule the objection  
16 based on that limitation.

17 BY MR. GIDLEY:

18 Q. Mr. Dritsas, over those 19 years, have you been  
19 moderately successful in selling Klor Con 8 and 10 to  
20 doctors and pharmacists?

21 A. We've been wildly successful selling Klor Con 8  
22 and 10 to pharmacists and doctors.

23 Q. Why do you say "wildly successful," sir?

24 A. Well, because given the resources that we have  
25 and in my opinion some of the competition that we're up

1     against, I think we've done a remarkable job of going  
2     out and being able to drive market share in the KCl  
3     market.

4           Q.   And when you refer to competitors, are you  
5     referring to the resources of your competitors?

6           A.   I am.  We're up against some very big companies  
7     with a lot bigger budgets than we have and a lot bigger  
8     field force and sales forces.  So, I think we've done  
9     an incredible job.

10          Q.   I want to go back to the beginning of Klor Con  
11     and your involvement with that product line, if I  
12     could, sir.

13                When you joined the company, what Klor Con  
14     products were being sold by Upsher-Smith?

15          A.   When I joined, we were selling the Klor Con  
16     powder, and we were really the first low-cost  
17     alternative for these -- for these patients, and so the  
18     pharmacists were very excited to hear from us, and we  
19     sold a lot of product.

20          Q.   And when you say you had a powder product, what  
21     strength was the powder sold in at this time?

22          A.   The powder is a 20 milliequivalent, and we also  
23     have a 25 milliequivalent.

24          Q.   And do you still sell that product today 19  
25     years later?

1 A. Oh, yes.

2 Q. Were there any other Klor Con products in  
3 1983-1984?

4 A. Late in '9 -- no, I'm sorry, in '95 -- in 1985,  
5 we introduced an effervescent. So, in answer to your  
6 question, no, there were not.

7 Q. All right, let's move to the introduction of  
8 the effervescent. So, in 1985, you introduced a new  
9 Klor Con product. Is that right?

10 A. Yes, we did.

11 Q. And tell me a little bit about that product,  
12 please.

13 A. Well, it's the Klor Con effervescent, and we  
14 found a manufacturer, and we decided to enter it into  
15 the market, and we thought since we were calling the  
16 pharmacists anyway on the potassium -- and at that time  
17 there was a more expensive product on the market, the  
18 brand was Klor-vess, as I recall -- we had the same  
19 story. You know, here we are, we have got our brand,  
20 it's economical, it will save your patients money, and  
21 so we introduced that product.

22 Q. By the way, the name Klor Con, do you have an  
23 understanding where that came from?

24 A. Klor Con was there when I came.

25 Q. All right. And the effervescent product, what

1 makes it an effervescent? What does that refer to?

2 A. Well, it's in an effervescent tablet. It's a  
3 potassium bicarbonate.

4 Q. So, the powder, was it potassium bicarbonate  
5 that you were selling at this time?

6 A. No, the powder's a potassium chloride. The  
7 effervescent is a potassium bicarbonate.

8 Q. But do they treat the same condition, both  
9 products?

10 A. Both products treat hypokalemia. Both deliver  
11 potassium.

12 Q. So, the active ingredient is the potassium?

13 A. Potassium.

14 Q. I see. And do you recall what the approximate  
15 cost was of the launch of that product, the Klor Con  
16 effervescent product?

17 A. I did not head up marketing at that time, but  
18 we had a fairly limited budget, I do know that. It was  
19 the first time that we were ever going to actually get  
20 on a plane and fly out and talk to customers face to  
21 face, and I was one of the first people to do that, and  
22 so relative to our budget at that time, it seemed like  
23 we were spending a lot, but I don't know the exact  
24 dollar amount.

25 Q. Are you in a position to estimate the

1 approximate launch cost?

2 A. Oh, I would -- I am. I mean, by today's  
3 standard now, having overseen the marketing area, it  
4 was certainly less than \$100,000.

5 Q. And what activities did you undertake in 1995  
6 to launch the effervescent Klor Con product?

7 A. Well, we had started up a national sales  
8 department with two people who also called on the  
9 phone, and the three of us went across the country, and  
10 we sold the effervescent and a newly reformulated  
11 powder with a more palatable delicious taste to the  
12 wholesalers and then the chain drugstores.

13 Q. So, at the same time there was a reformulation  
14 of the earlier powder product?

15 A. Yes.

16 Q. And what happened next? What's the next Klor  
17 Con product that you introduced?

18 A. Well, very late in 1986, we got the first  
19 approval for -- or we got the approval for Klor Con 8  
20 and 10, and so we marketed these products as the first  
21 low-cost alternatives of the wax matrix type of  
22 product.

23 Q. And what's the dosage that is delivered when  
24 you say 10 and 8 with respect to those products?

25 A. Eight milliequivalents and 10 milliequivalents

1 of potassium.

2 Q. And what sorts of products are these? Are  
3 these tablets or --

4 A. Yes, they're the wax matrix tablet.

5 Q. What does "wax matrix" refer to?

6 A. Wax matrix refers to the core, and then the  
7 potassium is leached from the core in your intestine.

8 Q. And do you recall when those products were  
9 launched some of the companies that Upsher-Smith was  
10 competing against with the 8 and 10 tablet?

11 A. Well, the 8 and 10 tablet, the KCl market in  
12 general was -- in 1986, I believe we would have been  
13 competing against Abbott, Ciba-Geigy. I don't recall  
14 all of the different players in that year.

15 Q. Were the Klor Con 8 and 10 tablets A-B rated?

16 A. No, not when we introduced them. Later, about  
17 two years later, I think, the Klor Con 8 became A-B  
18 rated, but the Klor Con 10 is still a B-C rated product  
19 today.

20 Q. And what does "B-C rated" refer to?

21 A. Well, if you think of a generic equivalent  
22 product that's A-B rated versus a B-C rated product, an  
23 A-B rated product would mean that the innovator drug,  
24 if it was K-Tab in this case, and Klor Con 10, if it  
25 was A-B rated, that they were bioequivalent and A-B

1 rated to one another.

2 In this case, K-Tab is B-C rated, and Klor Con  
3 10 is B-C rated. So, when the pharmacist uses Klor Con  
4 10 for a K-Tab prescription, they make a therapeutic  
5 substitution.

6 Q. When you say "therapeutic substitution," what  
7 are you referring to?

8 A. I'm referring to them using a product that is  
9 not A-B rated for the prescription that they receive.  
10 So, they receive a prescription for K-Tab, but they  
11 dispense Klor Con 10.

12 Q. And what permits the pharmacist to make that  
13 therapeutic substitution?

14 A. Well, most states allow pharmacists to do that  
15 in their professional judgment, and there are even some  
16 states that mandate that if there is a lower cost  
17 alternative that's a therapeutic substitute, you have  
18 to dispense that.

19 Q. Are you familiar with the phrase "state  
20 substitution laws"? Does that mean anything to you?

21 A. Yes.

22 Q. And how does that relate to the concept of an  
23 A-B rating?

24 A. The state substitution law would say that, for  
25 example, the pharmacist, if it is -- in their

1 professional judgment, if they deem a product to be a  
2 suitable alternative, therapeutic substitute, that they  
3 can dispense that product.

4 Q. Now, how, sir, do you drive sales of a product  
5 when it's not A-B rated but B-C rated as the 8 and 10  
6 were initially?

7 A. Well, again, we go to the pharmacists, and we  
8 talk about using that, because they can make a  
9 therapeutic substitution. We go to the managed care  
10 organizations, and we talk about the economics of using  
11 our products, the services we provide. And then we  
12 also go to the physicians.

13 For example, a telephone sales rep might call  
14 an independent pharmacist. They might ask that  
15 pharmacist, who prescribes most of the products that  
16 are potassium? And if Dr. Carlson writes most of the  
17 products and they're stocking our Klor Con, they would  
18 call the doctor -- ask the pharmacist if they could  
19 call that doctor. So, there are a number of ways that  
20 we do that.

21 Q. I see. And what is the rating today on the  
22 Klor Con 10 tablet?

23 A. Klor Con 10 is B-C rated.

24 Q. And what was it rated in 1997?

25 A. It was B-C rated.



1           Q. When did Upsher-Smith develop a detail sales  
2 force, field sales reps, in other words?

3           A. Well, we developed a field force in February of  
4 2000.

5           Q. And how large was the initial detail force?

6           A. Fifteen people.

7           Q. And what territories were covered by those 15  
8 people?

9           A. Well, the whole country was covered by those 15  
10 people. I don't recall the exact cities in which they  
11 were located.

12          Q. And what products were being detailed when this  
13 field sales force was launched?

14          A. They were talking to physicians about Pacerone,  
15 which is our brand of amiodarone, our branded generic,  
16 and then they were also talking about the Klor Con  
17 product line with an emphasis on the Klor Con 10, to  
18 give, again, two 10s written for -- in place of a 20.  
19 And then they were also talking about Slo-Niacin and  
20 Niacor.

21          Q. Do you have a general understanding of what the  
22 average length of time one of your field sales reps  
23 would spend with a doctor?

24          A. Face to face?

25          Q. Yes.

1           A. Well, it could average from what we call a  
2   30-second detail, which means the doctor says hello to  
3   you, you get to talk to her until she gets to the room  
4   and that's it, to a sit-down session where they might  
5   give you ten minutes. On average, we hope for about  
6   two or three minutes.

7           Q. Do you meet -- in the course of a year, would  
8   one of these salesmen make multiple calls on the same  
9   doctor or would they always be calling on different  
10  doctors?

11          A. No, they call on -- multiple calls, they have  
12  doctors on different schedules. So, for example,  
13  certain doctors they will call on every four weeks,  
14  other doctors they will call on every six to eight.

15          Q. And how do you identify, when you have only got  
16  15 field sales reps, which doctors to call on?

17          A. We identify them by the high prescribing habits  
18  that they have. So, we cut it that way. We buy a  
19  list. We find out who are the high prescribers of  
20  amiodarone, of potassium products and of lipid-lowering  
21  agents.

22          Q. And let me take those drugs one at a time.  
23  Amiodarone, what does that do, sir?

24          A. Amiodarone is a product for rhythm management  
25  for your heart. It's indicated for ventricular

1       tachycardia.

2           Q.   And what is your brand name for amiodarone?

3           A.   Our brand name is Pacerone.

4           Q.   When did you introduce the Pacerone product  
5   into the marketplace?

6           A.   We introduced Pacerone in 1998, I think April  
7   of 1998, and we introduced a line extension to that,  
8   Pacerone 400 milligram, last year.

9           Q.   Was Pacerone in development in the spring of  
10   1997?

11          A.   Yes.

12          Q.   How has Pacerone done in sales?

13          A.   Pacerone out-sold all of our initial sales  
14   projections.  It's been a great product for us.

15          Q.   Can you give us a ballpark so we can have some  
16   feel what this is?

17          A.   It's about a \$23 million product.

18          Q.   And when you say \$23 million, you're talking  
19   about current sales or 1998 or --

20          A.   That would be current sales.

21          Q.   All right.  Do you recall the sales in 1998 or  
22   1999 for Pacerone?

23          A.   The first year we sold Pacerone, we sold almost  
24   \$40 million.

25          Q.   And you mentioned that it regulates rhythms.

For The Record, Inc.  
Waldorf, Maryland  
(301) 870-8025

1 Is it a cardiac drug?

2 A. Yes.

3 Q. And the other drug that you were initially  
4 detailing besides the Klor Con was Slo-Niacin, did I  
5 understand that right?

6 A. That's right, and Niacor.

7 Q. And how were you detailing Slo-Niacin and  
8 Niacor at this time, spring of 2000?

9 A. Well, we would talk to the physicians about  
10 their lipid-lowering prescribing habits in their  
11 patients, and we would talk to them about patients for  
12 whom niacin would be an appropriate therapy. So, for  
13 example, we would ask them about how many patients did  
14 they have that they were treating for H -- low HDL,  
15 which is an independent risk factor, because there is  
16 no other agent that raises HDL better than niacin, or  
17 we would ask them about their patients, most of whom or  
18 I should say many of whom were already on a  
19 lipid-lowering drug.

20 And so if they had already had a heart attack,  
21 an MI, myocardial infarction, we would talk to them  
22 about the new NCEP guidelines and ask them, are you  
23 able to get your patients down to 100 milligrams per  
24 deciliter of LDL on a single statin? Are you able to  
25 do that? And most physicians told us no, we have to

1 double the dose, we have to triple the dose. And our  
2 response was, well, then, you're doubling the cost and  
3 you're tripling the cost and you're not doing that.

4 If you add niacin in conjunction with that,  
5 then you're going to be able to lower the LDL, reach  
6 those target guidelines, and raise the HDL. It also  
7 treats triglycerides, it lowers triglycerides, and it  
8 also treats Lp(a).

9 Q. And you're talking about which product now,  
10 Slo-Niacin?

11 A. Well, I'm talking about niacin, both our Niacor  
12 as well as Slo-Niacin as a dietary supplement, yes.

13 Q. And of the drugs that you were detailing in the  
14 spring of 2000, were they all prescription drugs?

15 A. Slo-Niacin was not a prescription. The Niacor  
16 is, and the other products were.

17 Q. Do you have an understanding of the approximate  
18 cost for launching your detail sales force in the year  
19 2000?

20 A. I do. I'm going to say it was approximately \$7  
21 million.

22 Q. \$7 million?

23 A. Yes, sir.

24 Q. Doing face-to-face details, did you see any  
25 effect on Klor Con prescription trends?

1           A. Yes, the face-to-face detailing has helped us  
2     increase the voice that we had out there, but really  
3     prior to that, we started a direct mail program to  
4     physicians, and we had a great response, and that's  
5     when I first started noticing more Klor Con 10 being  
6     utilized.

7           Q. Now, I want to go back now and talk a little  
8     bit more about the development of the Klor Con  
9     marketing strategy in potassium.

10           Did there come a time when you began to  
11    introduce private label KCl?

12           A. Yes.

13           Q. And when I say "KCl," what does that refer to?

14           A. Potassium, potassium chloride.

15           Q. And tell me a little bit about your private  
16    label initiative at Upsher-Smith for potassium.

17           A. Well, initially we came out with private label  
18    products for the 8 and 10 wax matrix, and this enabled  
19    us to offer yet a lower cost generic in that we went to  
20    Gold Line and Major and other places that really sold a  
21    wide breadth of generic products, many more products  
22    than we had, and so it was able to help us to gain  
23    access into customers and classes of trade where we  
24    just didn't have -- we just didn't have the breadth of  
25    products to get in there, and Gold Line did. And so

1     that offered -- they then, you know, positioned  
2     their -- it as one of their generic products.

3             And then in addition to that, it helped us  
4     because we had longer runs -- excuse me, we had longer  
5     runs in manufacturing. So, there were some internal  
6     benefits as well in terms of utilizing the capacity  
7     that we had.

8             Q. And I just want to make sure we understand what  
9     we mean by "private label." When the product would be  
10    sold to a Major or a Gold Line, who determined the  
11    resell price of that product?

12            A. They did. When we sold it to Major and Gold  
13    Line, they became competitors with us.

14            Q. And why did that make sense, to create new  
15    competitors?

16            A. Well, because again, there were some markets we  
17    just couldn't get into anyway with ours because we  
18    didn't have enough product, we didn't have the breadth  
19    of products. And so in that market, they were able to  
20    get in where we would not be able to.

21            On the other hand, when we would call on the  
22    phone to independents, we would hear, sorry, I bought  
23    the Qualitest or I bought the Gold Line product.

24            Q. Now, you just mentioned Qualitest. Who is  
25    Qualitest?

1           A. Qualitest is a generic pharmaceutical  
2 manufacturer. They're -- they're a privately held  
3 company. We're estimating their sales to be between  
4 \$300 and \$500 million, and they have presence in  
5 chains, for example, they have a good relationship with  
6 Eckerd's, I believe, and CVS. They are also in all the  
7 wholesalers. They compete for source programs within  
8 wholesalers, also retail buying groups.

9           Q. What were the first potassium products you sold  
10 to Qualitest under your private label initiative?

11          A. We sold them an 8 mEq tablet, a 10 mEq wax  
12 matrix tablet, and we sold them the 20 milliequivalent  
13 powder.

14          Q. By the way, these generic companies, were they  
15 larger than Upsher-Smith at this time --

16          A. Most of them were --

17          Q. -- in terms of sales?

18          A. -- much larger than Upsher-Smith.

19          Q. I just want to touch briefly on manufacturing.

20                I know it's not a core focus for you, but of  
21 the Klor Con product line, what portions of the product  
22 line are manufactured at Upsher-Smith?

23          A. We manufacture the powder, we manufacture the  
24 8, the 10, and now our new products, the M10 and the  
25 M20.



1           Q. I want to change subjects now and talk a little  
2 bit about just prescribing behavior.

3           When does the demand for potassium products  
4 begin?

5           A. Well, the demand begins when a patient goes in  
6 to a physician and they're treated for hypokalemia, so  
7 the doctor would write a prescription for KCl.

8           Q. And how typically would the doctor prescribe  
9 potassium?

10          A. Well, the dosing ranges really quite a bit,  
11 anywhere from 15 to maybe 80 milliequivalents. The  
12 doctor will write a prescription either for a brand or  
13 they would simply write an open prescription and say  
14 KCl, 40 mEq daily.

15          Q. When you say 15 to 18 mEq, is that per day?

16          A. Did you say 18? I said 15 to 80, 8-0.

17          Q. 15 to 8-0?

18          A. Yes.

19          Q. Thank you for listening.

20          Fifteen to 80 mEq, is that per day?

21          A. Yes, sir.

22          Q. And do you have an understanding about what the  
23 most common or frequent prescriptions tend to be for  
24 potassium in terms of mEq per day?

25          A. Our information would indicate about 40

1 milliequivalents.

2 Q. So, for a patient taking K-Dur 20, that would  
3 be maybe morning and evening, is that the way you would  
4 understand it working?

5 A. However they wanted to dose it. It would be  
6 two.

7 Q. And if you were trying to sell against those  
8 two K-Dur 20s, how would you do that in terms of Klor  
9 Con 10 in the 1997 time period for that patient?

10 A. Again, we would simply tell the physician that  
11 they're -- if they're breaking the tablet in half  
12 anyway, you can use two 10, and if -- even if they're  
13 not and they're interested in having a lower cost  
14 alternative, we have the Klor Con, and so write for  
15 Klor Con.

16 Q. At the doctor's prescription pad, literally in  
17 1997, what were some of the things doctors would write  
18 in a prescription for potassium? Can you give me some  
19 examples?

20 A. They might write, for example, they could write  
21 "Klor Con, 2 X 10 daily." They could write "K-Dur."  
22 They could write "KCl 20 milliequivalents, 40  
23 milliequivalents Q daily."

24 Q. If they wrote it without reference to a brand,  
25 20 mEq per day potassium, how would you get a

1 prescription filled with the Upsher product?

2 A. At the pharmacy level.

3 Q. And how would you go about making sure that  
4 that occurred?

5 A. Well, we called the pharmacists, the  
6 independent pharmacists, today we have about 23,000  
7 independent pharmacists profiled, and we call them all  
8 the time, and so we would -- we would try and make sure  
9 that all the pharmacists would have a preference for  
10 our product and use it, and in the national account  
11 area, Klor Con 10 is in virtually all of the chains.

12 Q. You had used a word "profile." What does that  
13 refer to?

14 A. It's a customer base. So, just as -- you know,  
15 in 1983, when I was calling on the phone and  
16 introducing here's who Upsher-Smith is and I would  
17 write down the pharmacist, the name and so forth, over  
18 the years, we have compiled that information. We don't  
19 write it down anymore, and we don't put it in a file.  
20 Today we have it automated. It's in the electronic  
21 files, part of our customer base.

22 Q. Now, if the physician writes the prescription  
23 for K-Dur 20, is that the end of the story? Have you  
24 lost the chance to get that prescription filled with  
25 Upsher-Smith Klor Con in the 1997 time period?

1           A. No, no, that's -- that's the opportunity. If  
2           the physician has written for K-Dur 20, our opportunity  
3           is to have the pharmacist make a therapeutic  
4           substitution, and that's why we provide the information  
5           for them to do that. And then again, there's some  
6           states that mandate a therapeutic substitution if  
7           there's a lower-cost alternative that's therapeutically  
8           equivalent available.

9           In addition to that, there were managed care  
10          programs that said we will not reimburse for a 20 mEq  
11          tablet when there are any number of generically priced  
12          products out there. So, that's where -- even if the  
13          prescription were written that way, there were numerous  
14          opportunities that we had to have it filled with Klor  
15          Con 10 or our powder, by the way, or our 8 or our  
16          effervescent, whatever the choice of the pharmacist or  
17          the patient was.

18          Q. Let's talk now about the scenario involving  
19          managed care. How would you go about in the 1996-'97  
20          time period selling Klor Con to managed care?

21          A. Well, we would meet with a managed care  
22          organization, and we would talk about their potassium  
23          needs. You know, keep in mind that potassium is  
24          commonly prescribed, and so if you're part of a managed  
25          care organization, it's going to be one of the more

1     prescribed drugs that you're looking at. And we would  
2     talk about the economics of having Klor Con 8 and 10  
3     and the powder and the effervescent.

4             And so we would talk to them about having  
5     ideally a preferred status on a formulary so that when  
6     you went into the doctor's office, he or she would  
7     write for Klor Con for you because that was the  
8     preferred product that that managed care organization  
9     wanted the doctor to prescribe.

10            Q. And can you just define or explain what the  
11     word "formulary" means in the managed care context at  
12     this time?

13            A. The formulary would be a list of drugs that the  
14     physicians would have available that would tell them  
15     what products the managed care would pay for, what --  
16     and those would be the formulary items, and then within  
17     those formulary items, that dictates what you or I as  
18     consumers, if you're part of a plan, what you would  
19     have a co-pay on. So, the co-pay might be lower for a  
20     generic and it might be very high for a branded product  
21     if they were both on the formulary.

22            But there's another scenario where the branded  
23     product won't be on the formulary at all, which means  
24     you would tell your patient, if you want this product,  
25     you have to pay for it yourself, because your plan is

1 not going to cover it, but I can write two Klor Con 10  
2 and your plan will cover that, and you'll have a  
3 co-pay.

4 Q. In 1997, did some managed care plans not cover  
5 K-Dur 20?

6 A. Yes.

7 Q. In 1997, were you successful in getting Klor  
8 Con 8 and 10 listed in some managed care formularies?

9 A. Yes.

10 Q. Would you explain how the role of co-pays might  
11 influence the patient's preference for a particular  
12 brand of potassium?

13 A. Well, if you were to get a prescription and  
14 you -- let's say you got a prescription for K-Dur 20 in  
15 this case, and you went into the pharmacist, the  
16 pharmacist would then go back, they would look at your  
17 insurance card if you were part of that, and their  
18 record would pop up to say whether or not you were --  
19 that your plan would pay for this.

20 If it wouldn't, then they would come back to  
21 you and they might say, I can fill this with K-Dur. It  
22 might cost you \$70 -- and I'm just using an arbitrary  
23 number here -- it might cost you \$70; however, I do  
24 have something that your plan does cover. It's Klor  
25 Con 10, for example, and there's a \$6 co-pay. Would

1     you prefer to have K-Dur in this case, and then you  
2     will pay for that because your plan doesn't cover it,  
3     or would you prefer to have the Klor Con, which is  
4     covered and you'll have a \$6 co-pay?

5           Q. And in your experience, how did that influence  
6     the patients in their choice of potassium?

7           A. Well, you know, again, seven out of ten  
8     patients during that time period were getting  
9     prescriptions for something other than the K-Dur, so  
10    the doctors were either writing for something other  
11    than K-Dur or the patients -- or they were writing for  
12    it and seven out of ten patients were having it filled  
13    with something that was other than K-Dur. So, from our  
14    viewpoint, it was very successful.

15          Q. In general -- and again, I'm not asking for a  
16    medical opinion -- but in general, your understanding  
17    as the head of sales and marketing at Upsher-Smith, how  
18    long does someone take a potassium supplement?

19          A. You can be on potassium for the rest of your  
20    life once you've been diagnosed with hypertension if  
21    you're going to be on a diuretic. My aunt has been  
22    taking Klor Con, I'm proud to say, for 12 years. She's  
23    78 years old, and I don't see any time -- I shouldn't  
24    say, I'm not a medical expert, but anyway, she has been  
25    taking it for 12 years.

1           Q. Is that typical or common that people would be  
2 taking the drug for years, that it's a long-term  
3 prescription?

4           A. It's a chronic therapy; it's not an acute  
5 therapy.

6           Q. Do the patients taking potassium products tend  
7 to be somewhat cost-sensitive?

8           A. Yes, that was part of our receptivity from the  
9 physicians. As I said, some of these patients are on  
10 as many as seven or eight prescriptions, and if they're  
11 older, they're on seven other prescriptions, then being  
12 able to save money in a potassium therapy that you're  
13 going to take for the rest of your life would be very  
14 beneficial.

15          Q. Now, in the 1997 time period, what's the best  
16 thing that you at Upsher-Smith would want written for a  
17 potassium prescription? What would be the best outcome  
18 coming from the doctor's office?

19          A. I would want Klor Con 10 DAW.

20          Q. What does DAW mean?

21          A. It means dispense this as written.

22          Q. I see.

23                 Now, sir, there has been some discussion in  
24 this courtroom about switching costs, and I just want  
25 to ask you a couple of questions about that concept.



1           At the time the doctor is meeting with the  
2   patient and writing the initial prescription for  
3   potassium, what's the switching cost between writing  
4   Klor Con or K-Dur or another brand or something else?

5           A. There are no switching costs.

6           Q. All right. Let's say that the doctor instead  
7   writes the prescription for K-Dur 20 and that gets sent  
8   off to the pharmacy. What are the switching costs for  
9   a pharmacist to substitute in 1997 two Klor Con 10s for  
10  the K-Dur 20 prescription?

11          A. Well, there are no switching costs to the  
12  consumer. The pharmacist is on the phone with the  
13  doctor and the doctor's office all the time. That's  
14  what they do. And so they are -- it could be as simple  
15  as I can't read this. It can be did you mean 20 mEqs a  
16  day? Did you mean -- whatever, they are constantly  
17  talking. Most of the calls they make are usually on  
18  insurance questions, but at any rate, they're on the  
19  phone anyway with the doctor. I don't know what a  
20  switching cost would be, because they're calling them  
21  all the time anyway.

22          Our experience is that they call in, they talk  
23  with -- they don't even talk with the doctor  
24  necessarily. They simply call the nurse and say I can  
25  prescribe -- I can dispense two Klor Con 10s, the

1 patient is interested in saving money or it's what I  
2 have, and they're given permission to do that.

3 Q. Is the phrase "switching costs" used in your  
4 industry?

5 A. No.

6 Q. Is the concept of a switching cost discussed in  
7 your industry?

8 A. No.

9 Q. To the consumer, far from there being switching  
10 costs, can there be savings when substitutions are made  
11 at the pharmacy level?

12 A. Absolutely. If you came in with a prescription  
13 for K-Dur and your pharmacist called the doctor and  
14 said, I can give you Klor Con 10, then you've just  
15 saved the cost of the brand to a generically priced  
16 product.

17 Q. This business of getting the pharmacist to make  
18 a therapeutic substitution, was that part of your  
19 business model for potassium in 1997?

20 A. It's how we built the potassium model.

21 Q. And by the way, just for the pharmacist, are  
22 there significant switching costs experienced by the  
23 pharmacist to substitute between two different brands  
24 of potassium?

25 A. No. For example, if you're in -- if a

1 pharmacists was in a state where there was mandatory  
2 therapeutic substitution, the pharmacist substitutes  
3 that product. There is no cost involved. They just  
4 substitute the product.

5 Q. Is it common or does it happen that sometimes  
6 pharmacists get payments or incentives to make  
7 substitutions?

8 A. I don't know of any -- I don't know that you  
9 would incentivise a pharmacist to make a substitution.

10 Q. Well, are there any discounts or promotions  
11 that are paid to national chains or other --

12 A. That's a different -- yes, that's a different  
13 scenario. A chain, for example, or a managed care  
14 program might have market share programs where really  
15 the vendor is -- might pay something to the chain for  
16 market share gains, and I don't know that the  
17 pharmacist would receive that, but that might be  
18 something worked out between a national chain and a  
19 vendor.

20 Q. And might that create a financial incentive to  
21 switch prescriptions between two different brands?

22 A. Absolutely.

23 Q. How about managed care, are you familiar with  
24 or have you ever at Upsher-Smith made a payment or an  
25 incentive or a promotional payment to get listed on the

1       formulary of a particular managed care plan?

2           A.   We have, and there are -- they're, again, what  
3       you would call market share programs where you could  
4       take a baseline of what your market share was and then  
5       if you can increase that, there would be some type of  
6       rebate involved.

7           Q.   We talked about this earlier, but I want to  
8       shift gears and hit a few questions.

9           A.   Okay.

10          Q.   Going back to this concept of two 10s for a 20.  
11       When you say 20, before September 1, 2001, you're  
12       talking about K-Dur 20?

13          A.   That's right.

14          Q.   All right, and we're talking about potassium,  
15       right?

16          A.   That's right.

17          Q.   In the period 1995 to 2000, Mr. Dritsas, did  
18       you consistently market two of your Klor Con 10 mEq  
19       tablets against K-Dur 20?

20          A.   Yes.

21          Q.   Was there any difference in terms of  
22       performance between your Klor Con 10 wax matrix product  
23       and the K-Dur 20 in terms of delivering potassium?

24          A.   No, all the -- all of the potassium products  
25       are therapeutically interchangeable. They all deliver

1 potassium.

2 Q. When you market two 10s versus a K-Dur 20, does  
3 the patient take the Klor Con 10 at the same time --  
4 the two tablets at the same time they take the K-Dur  
5 20?

6 MS. BOKAT: Objection, Your Honor. I don't see  
7 that we've got any foundation for this witness knowing  
8 how the patients take the pills.

9 MR. GIDLEY: I'd be happy to lay that  
10 foundation, Your Honor.

11 JUDGE CHAPPELL: I'll sustain that.

12 MR. GIDLEY: And again, Your Honor, I'm not  
13 offering him as an expert. I'm offering him as a fact  
14 witness, and we're simply asking Mr. Dritsas about his  
15 sales and marketing background.

16 JUDGE CHAPPELL: Well, and as I said, under the  
17 federal rules, actually Rule 701, opinions he gives us  
18 have to be based on perception, not on expertise, not  
19 on technical or specialized knowledge, and I think if  
20 where you're going is his observation or his knowledge  
21 based on his marketing experience, I'll allow that.

22 BY MR. GIDLEY:

23 Q. Sir, let me start back. For many years you've  
24 been marketing two 10s -- Klor Con 10s against the  
25 K-Dur 20. Is that correct?

1 A. Yes.

2 Q. And in coming up with that marketing campaign,  
3 did the people at Upsher-Smith, including your  
4 department, give some thought to the practical  
5 implementation of what the patient would be doing with  
6 the two different products?

7 A. Yes.

8 Q. And did you envision a typical scenario where  
9 the patient would be taking your drug rather than the  
10 K-Dur product from Schering?

11 A. Yes.

12 Q. And in tailoring and writing marketing messages  
13 and in detailing to doctors, was there a typical  
14 scenario that you had in mind for the use and  
15 administration of the Klor Con 10 mEq tablet against  
16 the K-Dur 20 tablet?

17 A. Yes.

18 Q. And sir, at Upsher-Smith, when you're detailing  
19 and making telephone calls to the pharmacists, what was  
20 your understanding of what patients would be doing when  
21 they used your product rather than the K-Dur product?

22 MS. BOKAT: Objection, Your Honor. We have  
23 seen that the Upsher-Smith marketing people sat at  
24 Upsher-Smith and envisioned how a patient might use  
25 this product, but we still don't see any foundation for

1 knowing exactly how they did take it.

2 JUDGE CHAPPELL: I'll sustain that. If you can  
3 demonstrate that he has knowledge based on his contact  
4 with pharmacists, information that was relayed on to  
5 him and he based marketing decisions on that, I'll  
6 allow that.

7 BY MR. GIDLEY:

8 Q. Sir, do pharmacists talk to patients about how  
9 they take prescription drugs?

10 A. Yes, the pharmacists that we spoke to and, of  
11 course, the physicians that we spoke to.

12 Q. You mentioned earlier that you had a database  
13 of pharmacists. Is that correct?

14 A. Yes.

15 Q. And today, approximately how many pharmacist  
16 contacts are in that database?

17 A. Well, there are 23,000 pharmacies, and then  
18 each pharmacy might have multiple pharmacists working  
19 there.

20 Q. And sir, for every entry in your database, was  
21 there at least one phone contact between Upsher-Smith  
22 and the particular pharmacist that's in your database?

23 A. Yes.

24 Q. Many times, are there multiple contacts?

25 A. Usually there are multiple contacts.

1           Q. Are these calls that last 10 or 15 seconds or  
2 have you had and your staff had the opportunity to talk  
3 to pharmacists about what goes on with their patients  
4 in administering Upsher-Smith products?

5           A. We have a very good relationship with many of  
6 those customers that we've honed over the last 19  
7 years, and so we have ample opportunities to talk about  
8 their business, what their patients or customers' needs  
9 are, their physicians.

10          Q. Do you get feedback that's valuable to the  
11 company in the sales and marketing department from what  
12 you learn from these pharmacists?

13          A. Yes, it helps us very much to craft our  
14 message, to help us learn about unmet needs.

15          Q. And is some of the feedback that you get  
16 feedback that the pharmacist is relating from their  
17 patient experience?

18          A. Yes, it would be.

19          Q. And when we talk about the patient experience,  
20 that would include potassium products?

21          A. Yes.

22          Q. And we would also be including Klor Con 10 and  
23 8 mEq tablets. Is that correct?

24          A. That's correct.

25          Q. Would your staff and you yourself receive



1 feedback from the field on how patients are taking the  
2 drugs?

3 A. Yes, I've personally talked to doctors when  
4 I've been out in the field.

5 Q. And does that -- is that feedback used at  
6 Upsher-Smith to craft and tailor sales and marketing  
7 messages?

8 A. Yes, it is.

9 Q. Is it also used in a company your size to  
10 tailor what your future marketing and sales efforts and  
11 initiatives would be?

12 A. Yes, it would be.

13 Q. And in connection with that feedback, do you  
14 have an understanding of the typical scenario of what  
15 patients do when you succeed in getting the pharmacist  
16 to substitute two Klor Con 10s for a K-Dur 20?

17 A. Yes, I do. The -- if your doctor prescribed 20  
18 mEq's a day and you were to go from K-Dur, for example,  
19 to Klor Con, you would take two of the Klor Con at the  
20 same time you'd take your K-Dur. There would be no  
21 special instructions telling you to separate them, take  
22 them at different times. Your doctor would simply say  
23 if you take it every morning, then take two 10 mEq  
24 tablets every morning.

25 Q. At the same time you would have taken the K-Dur

1 20?

2 A. Whenever you were taking the K-Dur 20, you can  
3 take this. There is no therapeutic reason why you need  
4 to alter that or change anything that you were doing  
5 before.

6 Q. Is there any special group of hypersensitives,  
7 hypokaleemics, say measured by age, sex, other patient  
8 characteristics, that can only take a K-Dur 20 and  
9 cannot take Klor Con products, such as Klor Con 10?

10 A. No, I've never heard of any special group that  
11 needs a special kind of potassium.

12 Q. Let me talk about patient compliance.

13 Now, are you familiar -- do you have an  
14 understanding of the kind of marketing messages that in  
15 the '96-'97 time period Schering was using for their  
16 K-Dur 20 product?

17 A. Yes.

18 Q. What's your understanding of the kind of  
19 messages that Schering was using to drive sales of  
20 K-Dur 20 against Klor Con?

21 A. Well, of course, we kept our eye on the K-Dur  
22 product and on Schering quite a bit, and their basic  
23 message was a marketing message, and that was based on  
24 convenience, you know, you should prescribe this  
25 product because it's convenient, and along with that

1       there was a little bit of the -- for example, if you  
2       were going to do 20 -- prescribe 20 mEq a day, you'd  
3       get to prescribe only one tablet, so it's convenient,  
4       and there's a patient convenience story.

5               And then they heavily promoted it, and then  
6       they supported it with samples, and that was how they  
7       marketed it as far as we could tell.

8               Q.   In reality, was there a big actual edge between  
9       the K-Dur 20 and the Klor Con 10 products in terms of  
10      patient compliance?

11              A.   No.

12              Q.   How have patients tolerated Klor Con 10 mEq  
13      tablets?

14              A.   Fine.

15              Q.   Has there been research done into the effects  
16      on patients over some period of time for Klor Con 10?

17              A.   I'm -- no, I'm not aware of any research on any  
18      of the products with regard to compliance.

19              Q.   How about comparative studies? Are you aware  
20      of any patient compliance studies that compare K-Dur 20  
21      versus two Klor Con 10 mEq tablets?

22              A.   No, I'm not aware of any studies.

23              Q.   Going back to 1997, what was the approximate  
24      market share of Schering's K-Dur 20 product in 1997?

25              A.   As I recall in 1997, they had about 30 percent

1 of the prescriptions, roughly.

2 Q. As the head of sales and marketing for  
3 Upsher-Smith, how did you view the potassium market in  
4 June of 1997?

5 A. Well, we viewed it as the KCl market, which  
6 included a number of products. There were multiple  
7 competitors, all with different types of promotional  
8 and pricing strategies, you know, some of whom, like  
9 K-Dur, we viewed as being aggressive with the doctors,  
10 competitively priced. Then you had other products  
11 offered by Apothecan, for example, that were really  
12 aggressively priced. They weren't promoted to  
13 physicians. There were just a number of different  
14 players, and it was a fairly crowded market.

15 Q. Let's go to another topic. I want to talk to  
16 you a little bit about this patent lawsuit.

17 Did there come a time when you learned that  
18 there was a patent lawsuit that had been brought  
19 against Upsher-Smith concerning the Klor Con M20  
20 product?

21 A. Yes.

22 Q. And briefly, what was the Klor Con M20 product?

23 A. The Klor Con M20 was our 20 milliequivalent  
24 micro-dispersible product, potassium chloride product.

25 Q. Did the existence of the lawsuit have any

1 impact on -- any direct impact on your department in  
2 1996 or '97?

3 A. Absolutely. We were -- you have to think of  
4 the size company we were at that time, but we were  
5 spending a tremendous amount of resources. I was not  
6 aware of any other major litigation that we had ever  
7 been involved in, and I know from a marketing  
8 perspective, it affected my budget, it affected what I  
9 had, the resources I had available just to promote the  
10 products that I had.

11 Q. How did it affect your budget?

12 MS. BOKAT: Excuse me. I would like to object  
13 to the pending question and move to strike the earlier  
14 answer. During the discovery phase of this case, we  
15 issued a request to Upsher-Smith for financial  
16 information. They were reluctant to provide that, so  
17 we struck an agreement with Upsher-Smith that they  
18 would not put their financial condition -- would not  
19 raise it as a defense in this matter.

20 What this witness is now testifying about is  
21 the financial impact of the lawsuit on his department's  
22 resources and budget. So, I object, because we were  
23 denied discovery on it, with the agreement that they  
24 would not be raising it.

25 MR. GIDLEY: Let me address that, Your Honor.

1 My questions go to opportunity costs, which are true  
2 for Exxon-Mobil, Schering-Plough, Abbott or  
3 Upsher-Smith; that is, all resources within a  
4 corporation trade off against one another. I'm not  
5 arguing that the absolute size of Upsher-Smith is at  
6 stake here. My questions go to the uses they put to  
7 money between litigation or other parties, the  
8 opportunity costs. That's true of any business.

9 JUDGE CHAPPELL: Did you enter into the  
10 agreement that Ms. Bokat just discussed?

11 MR. GIDLEY: My colleagues did, Your Honor, and  
12 I think Mr. Curran is better placed to address it.

13 MR. CURRAN: Yes, Your Honor, I believe the  
14 agreement is memorialized in writing. Perhaps if Ms.  
15 Bokat has that, we can show that to the Court, and I  
16 think that will indicate that the agreement was we  
17 would not use historical financial records as a defense  
18 to why Upsher-Smith entered into the licensing  
19 agreement, nothing to do with the impact of the patent  
20 litigation expenses on operations and so forth. If Ms.  
21 Bokat would be kind enough to show the written  
22 memorialization of the agreement, I'm sure that point  
23 can be established.

24 JUDGE CHAPPELL: I don't need to get into an  
25 agreement between the parties. What I am going to do

1 is ask both sides to review that and review this  
2 response during the next break and let me know if you  
3 want to renew your objection. So, I'm going to  
4 withhold ruling at this time. I can always disregard  
5 this answer if I need to.

6 MR. GIDLEY: Very good, Your Honor. I can move  
7 on to another line of questioning.

8 BY MR. GIDLEY:

9 Q. Did there come a time when you learned that the  
10 patent lawsuit between Schering-Plough and Upsher-Smith  
11 had been settled?

12 A. Yes.

13 Q. And do you recall approximately when that was?

14 A. I believe it was June of 1997.

15 Q. And were you familiar at that time with the  
16 Hatch-Waxman Act in broad terms?

17 A. Yes.

18 Q. And was it your -- what was your understanding  
19 about the effect of the Schering-Plough/Upsher-Smith  
20 settlement in terms of whether or not you would get the  
21 180 days exclusivity?

22 A. My understanding was that as a result of  
23 settling and not going to court and prevailing, that we  
24 lost the opportunity or we lost the 180 days  
25 exclusivity. That's how it was told to me.

1           Q. What is your best recollection at the time, in  
2           June of 1997, of what you believed would be the effect  
3           on the 180 days exclusivity had you litigated the case  
4           to a successful resolution; that is, that you won the  
5           lawsuit without a settlement?

6           A. I was told and I believed that if we won the  
7           lawsuit without a settlement, we would get 180 days  
8           exclusivity on the market, which was kind of set up as  
9           a result for companies who did fight it out and did  
10          prevail.

11          Q. Did there come a time later when you learned  
12          that, in fact, you would be getting 180 days  
13          exclusivity with respect to the M20 product?

14          A. Well, a couple years later, yes.

15          Q. All right. And what is your understanding  
16          sitting in the courtroom today as to the beginning and  
17          end of the 180-day period? And I -- what's your  
18          understanding?

19          A. Today?

20          Q. Yes, sir.

21          A. We did get the 180 days. It ends February  
22          28th.

23          Q. And the period began when?

24          A. I'm sorry, the period began September 1st of  
25          '01.



1           Q. When did you first become eligible to market  
2 Klor Con M20?

3           A. On September 1st of '01.

4           Q. Was there any delay between your eligibility to  
5 market the drug and the actual marketing efforts by  
6 Upsher-Smith?

7           A. No. In fact, we went out and started talking  
8 to our customers before then.

9           Q. Tell me a little bit about that. What did  
10 customers tell you when you began to premarket the Klor  
11 Con M20 product?

12           MS. BOKAT: Objection on hearsay, Your Honor.

13           MR. GIDLEY: Well, I'm not offering it, Your  
14 Honor, for anything more than his state of mind in  
15 launching the product line as the head of sales and  
16 marketing. We're not --

17           JUDGE CHAPPELL: So, it makes no difference to  
18 you whether or not what the customers said to him was  
19 true or was false. You're merely offering it because  
20 it was said?

21           MR. GIDLEY: That's right.

22           JUDGE CHAPPELL: With that understanding, I'll  
23 overrule the objection since he's just defined it as  
24 nonhearsay.

25           THE WITNESS: I'm sorry, can you repeat the

1 question?

2 BY MR. GIDLEY:

3 Q. I'd be happy to.

4 Can you tell me about some of the discussions  
5 you personally had with customers before September 1  
6 about the M20 product line?

7 A. I can. With -- we knew that we would be able  
8 to launch the product on September 1st, and you can't  
9 simply go out on September 1st and expect all of your  
10 customers to purchase the product and put it in their  
11 system. It takes a certain amount of time in order for  
12 them to set item numbers, work out the logistics,  
13 assign the things that they're going to do internally.

14 On average, for example, wholesalers like 60  
15 days notice. Chains like at least 30 but prefer 60 as  
16 well. And so prior to actually launching the product,  
17 Tom Burke, who's my director of sales, and I went out,  
18 and we talked to some of our customers, and our job  
19 early on was just to find out if we could get an idea  
20 of what they would intend to do with this so that we  
21 could better forecast and make sure that we could meet  
22 the needs that they had.

23 And so we talked to a number of different  
24 customers, we didn't talk to everybody, and we went  
25 into wholesalers, for an example, we chose a couple of

1 chains to go to, like CVS and Long's, and then we also  
2 talked to some managed care.

3 In general, people were excited. I think by  
4 that time it was public knowledge that we had an  
5 approval, but we did find out some things that  
6 surprised us regarding --

7 Q. Let's hear a little bit about that.

8 A. Well, for example, we shared with some  
9 market -- with them some of our market projections in  
10 terms of what we thought we could do, and a number of  
11 our customers pointed out to us that we are dealing  
12 with a company that for many customers really thinks  
13 like a generic, and so the pricing assumptions you're  
14 using and the other things don't really reflect the  
15 type of conditions that they have with us. So --

16 Q. And what company were these discussions focused  
17 on?

18 A. This was the -- I was at Bergen, for example,  
19 and we were talking about Schering-Plough and the K-Dur  
20 product, and Bergen, for example, Chris Dougherty and  
21 Fred Sterns, said, you know, this is great, we love you  
22 guys, we're really behind you, but it's just our  
23 opinion, we think you're being overly optimistic in  
24 terms of what kind of market share you're going to be  
25 able to capture, because, you know, you're dealing with

1 a company that has a lot of resources. They deal in  
2 many ways like a generic company.

3 So, you have some -- some false assumptions in  
4 there, if you will, in terms of what you think you're  
5 going to be able to share, and that has to do with  
6 market conditions, breadth of products, what they're  
7 allowed to -- what they're allowed to do on that.

8 Q. What did you do when you returned to  
9 Upsher-Smith after your visit with Bergen?

10 A. I talked to John Adams, our product manager,  
11 and I asked him to moderate the market share down. I  
12 believe we had, after the pipeline and everything else,  
13 I think we were looking at having about a 50 percent  
14 market share, and I asked him to moderate that down  
15 around 35 with the explanation that they're far more  
16 competitive on their pricing within certain customers  
17 and they have the resources that we don't in order to  
18 do things, and I just wasn't aware of that before.

19 Q. And I'm sorry, you said market share, are you  
20 talking about the 20 mEq segment? What are you  
21 referring to?

22 A. Yes, I'm talking about that segment.

23 Q. Now, did there come a point in time when -- I  
24 want to go back to your meeting. You mentioned two  
25 gentlemen, two gentlemen from Bergen. What were their

1 names again?

2 A. Actually a gentleman, Fred Sterns, and a woman  
3 named Chris Dougherty.

4 Q. I'm sorry. And they worked for Bergen?

5 A. Yes.

6 Q. And what kind of company is Bergen?

7 A. Bergen is a wholesaler. It is now part of  
8 AmeriSource Bergen, the largest wholesaler and  
9 distributor in the world.

10 Q. And how does this wholesaler fit into this  
11 world of pharmacists? Who are their customers?

12 A. Well, they're a distributor in this case, so  
13 their customer could be chain pharmacists, it could be  
14 independent pharmacists, long-term care, nursing home,  
15 they have their own mail order facility.

16 Q. And this comment about you're up against a  
17 company that thinks like a generic, what company were  
18 they referring to?

19 A. Schering-Plough.

20 Q. And what product were they referring to?

21 A. K-Dur.

22 Q. Is that both 10 and 20?

23 A. It was both 10 and 20. We were focusing mostly  
24 on the 20.

25 Q. So, when you got back to Upsher-Smith after the

1 Bergen meeting, what were the things that you did?

2 A. Well, we came back -- certainly because we  
3 heard it from more than one customer, we came back with  
4 a little bit more of a sense of what we were really  
5 going to be up against, and so I realized that some of  
6 our pricing assumptions, some of our things that we had  
7 put into the models weren't necessarily accurate. They  
8 never are, they're just guesses, but it gave me a  
9 better idea of what we were going to be facing, and to  
10 that extent, I just asked the product manager to  
11 moderate the market share based on the input that we  
12 had received from these customers.

13 Q. You said there were multiple companies. Were  
14 there other companies that said similar things about  
15 Schering?

16 A. Oh, yes. Bob James at McKesson told me the  
17 same thing. When we were at CVS, they mentioned that.  
18 Some of the -- one managed care organization, and I  
19 don't recall which one it was, had similar feedback in  
20 terms of with the arrangement that we have right now  
21 with -- the market share arrangement that we have right  
22 now with Key/Schering on K-Dur, I can't imagine that  
23 your product would be of interest to us.

24 Q. Did this information --

25 MS. BOKAT: Your Honor, request for

1 clarification. Was that last answer just for the  
2 purposes of Upsher's perception or was it offered for  
3 the truth of what the customer said to Upsher-Smith  
4 representatives?

5 MR. GIDLEY: I offer it for the state of mind  
6 of the head of marketing and sales, not for the  
7 underlying truth of the matter asserted.

8 MS. BOKAT: Thank you.

9 JUDGE CHAPPELL: You need to listen closely  
10 also to the question. For example, that last question  
11 would have required just a yes or no answer, and then  
12 you went on and explained and gave more information,  
13 and so that all parties have a chance to object --

14 THE WITNESS: Okay, I see.

15 JUDGE CHAPPELL: -- you need to answer the  
16 question that is pending. Thank you.

17 THE WITNESS: Yes.

18 BY MR. GIDLEY:

19 Q. Before you had these discussions -- let me back  
20 up one step.

21 When did these discussions take place with  
22 McKesson and Bergen, can you place them in an  
23 approximate time frame?

24 A. The discussions started late in 2000, and then  
25 they went into 2001.

1           Q. And were these face-to-face meetings or  
2 telephone calls?

3           A. Face-to-face meetings.

4           Q. Typically at the customer's office?

5           A. Yes.

6           Q. All right. And before this time, in potassium,  
7 let's say in 1997, in selling potassium, would you  
8 ordinarily know what your competitors' actual prices  
9 were to customers?

10          A. No. No, we really don't know their actual  
11 pricing. On a rare occasion, a single customer might  
12 share with you, I'm paying this for a product, but we  
13 don't know.

14          Q. But typically in 1997, you wouldn't have known  
15 the actual sales price of competitive products?

16          A. That's correct.

17          Q. Now, sir, is there a phrase in the industry  
18 called "ASP" or some jargon about ASP?

19          A. Yes.

20          Q. What is ASP in the pharmaceutical industry and  
21 particularly with reference to potassium?

22          A. ASP is the average selling price.

23          Q. And does ASP reflect the actual net price that  
24 a customer is paying for a potassium product?

25          A. No. There --



1 Q. Why not?

2 A. There -- I'm sorry.

3 Q. That's okay, I'll ask you another question.

4 Why not?

5 A. There are several factors that aren't included  
6 when you look at average selling price. For example,  
7 if you set up a deal or you send free goods to a  
8 customer or you had a market share program, volume  
9 discounts aren't reflected in that, any promotional  
10 dollars that you would provide or any type of other  
11 volume incentives or terms, cash terms, none of that  
12 would be included in the -- in the average selling  
13 price.

14 Q. I want to direct your attention now to really  
15 the launch of the M20 product line around September 1,  
16 2001. In the time period September 1, 2001 to December  
17 31, 2001, could you state for the record the companies  
18 that were selling 20 mEq tablets of potassium.

19 A. Yes, there were four companies. Key/Schering,  
20 Warrick, Qualitest and Upsher-Smith.

21 Q. And who is Warrick?

22 A. Warrick is a generic arm of Key/Schering.

23 Q. All right. And Qualitest is a generic firm.

24 Is that correct?

25 A. That's correct.

1 Q. And sir, when did you begin selling product to  
2 Qualitest?

3 A. December.

4 Q. Of 2001?

5 A. I'm sorry, of 2001, yes.

6 Q. And can you estimate roughly what kind of  
7 quantities you've sold to Qualitest in that month?

8 A. It was about 20 percent of our production that  
9 month.

10 Q. Twenty percent of what production?

11 A. It was 20 percent of our M20 tablet and M10  
12 production.

13 Q. Are the tablets identical between the Qualitest  
14 private label and your Klor Con M20 product?

15 A. That's a very good question, and to my  
16 knowledge, they are. I would -- I would have to say  
17 that if there's a signifier or something on the tablet,  
18 on the back, there might be for Qualitest. Typically  
19 there is, but for my intents and purposes, they're the  
20 same tablet.

21 Q. Is it your understanding that the Qualitest  
22 product and the M20 product use the same production  
23 facilities?

24 A. Yes, they do.

25 Q. Is your product, the M20, scored?

1           A. Yes, it is.

2           Q. And what does it mean to have a scored  
3 pharmaceutical product?

4           A. It means that there's a line, and then the  
5 product can be broken in half.

6           MR. GIDLEY: Your Honor, I have just published  
7 to complaint counsel a bottle, 500-tablet bottle of the  
8 potassium chloride extended release tablets, USP 20 mEq  
9 potassium, prescription only. This label is in the  
10 witness exhibit, but I am physically holding the bottle  
11 now and would request permission to approach the  
12 witness.

13          JUDGE CHAPPELL: Do you have a prescription for  
14 that, Mr. Gidley?

15          MR. GIDLEY: I do not, Your Honor.

16          JUDGE CHAPPELL: Treat it with care, please.

17          Yes, you may approach.

18          MR. GIDLEY: I believe my office is in  
19 compliance with FDA rules, but I would prefer not to be  
20 audited at this time.

21          May I approach?

22          JUDGE CHAPPELL: Yes, you may.

23          Is there an objection to this bottle, Ms.

24 Bokat?

25          MS. BOKAT: No, Your Honor. I got my share.

1 JUDGE CHAPPELL: Okay.

2 MR. GIDLEY: May I, Your Honor?

3 JUDGE CHAPPELL: Yes, but you have to retrieve  
4 those as soon as you're finished.

5 MR. GIDLEY: Absolutely.

6 BY MR. GIDLEY:

7 Q. Mr. Dritsas, if you would, would you examine  
8 the tablet I just handed you --

9 JUDGE CHAPPELL: Do you think I need four of  
10 these, Mr. Gidley?

11 MR. GIDLEY: If you're like anyone in my  
12 office, in a few minutes you'll fidget and break at  
13 least one or two.

14 BY MR. GIDLEY:

15 Q. Sir, could you examine for the record the  
16 tablet I've just handed you?

17 A. Yes.

18 Q. And sir, would you describe what the tablet  
19 looks like for the record?

20 A. Well, it's a whitish oblong capsule-shaped  
21 tablet. It's scored on one side, and it says, "US 20"  
22 on the other.

23 Q. And sir, does this look identical to the M20 or  
24 is it different in any respect that you're aware of?

25 A. It looks like the M20.

1 Q. So, the M20 has the US on it. Is that correct?

2 A. I don't recall what the imprint is on the M20.

3 Q. All right. And this bottle would have been  
4 produced at your facility. Is that correct?

5 A. Yes.

6 Q. All right. And again, for the record, you're  
7 holding the Qualitest tablet, 20 mEq?

8 A. Yes.

9 Q. And it's scored?

10 A. Yes.

11 Q. And what color is it?

12 A. Whitish, off white.

13 Q. And sir, why did you sell product to Qualitest  
14 despite the existence of this 180-day period?

15 A. Well, much for the same reason that we've  
16 always extended our potassium line into other generic  
17 manufacturers. Qualitest has some advantage of breadth  
18 of products, of generic products, and therefore, they  
19 deal with some customers that we don't, and many of the  
20 same reasons. It's an all -- it's a way in which  
21 customers who are strictly looking for a generic from a  
22 generic house can get our product. There's economies  
23 of scale, I believe, in just producing more product.  
24 And so there's -- it's really the same rationale from  
25 my viewpoint.

1           Q. Does Qualitest control its own pricing of this  
2 product or do you have any influence over the pricing?

3           A. No influence over the pricing. Once they're in  
4 the market, we effectively compete with Qualitest.

5           Q. I want to talk a little bit about some of your  
6 launch activities for the M20.

7                   Sir, did you personally and did your department  
8 take steps to prepare for the launch of the Klor Con  
9 M20 product?

10          A. Yes, we did.

11          Q. And you've talked a little bit about some of  
12 your visits. Are there other steps that your  
13 department took in launching the Klor Con M20 product  
14 line?

15          A. Yes, our national account group, for example,  
16 went out and met with the wholesaler/chain accounts in  
17 order to get an idea of their initial orders and to  
18 facilitate everything that we needed to do so that on  
19 September 1st we could ship product.

20          Q. So, these customer discussions, the business --  
21 part of the business purpose was to figure out how much  
22 product to produce. Is that correct?

23          A. That's right.

24          Q. Has the Klor Con M20 product sold well in your  
25 view?

1           A. It's sold very well, but -- it's sold well.  
2       Prior to the launch of the 20 on September 1st, when we  
3       were going out and talking to customers, the one thing  
4       that affected this market from my perspective was in  
5       the summer, there was apparently a lack of availability  
6       of the K-Dur product, and so during that same time  
7       period, when you asked earlier were you going out and  
8       were you talking with customers, we were, and what we  
9       found in our telephone sales calls is that many of the  
10      independent pharmacists weren't able to get K-Dur, and  
11      this was prior to September 1.

12           So, this resulted in an increased demand for  
13      our Klor Con 8 and 10 products, and we saw that -- we  
14      saw that begin in the early summer. It really peaked  
15      for us, for example, in August, we sold twice as much  
16      of that product as we had predicted, and again in  
17      October.

18           Q. And when you say 8 and 10, are we talking about  
19      the wax matrix Klor Con product?

20           A. We are. So, in answer to your question now,  
21      when we went out to talk to our customers, we had  
22      this -- we had customers, for example, like Walgreens  
23      and Rite Aid who were actually switching every K-Dur  
24      prescription for two 10s, because they had the two 10s  
25      in the warehouse, they couldn't get any K-Dur 20

1 product, but they were getting prescriptions for K-Dur  
2 20.

3 So, John Zeibel, for example, talked to Eric  
4 Hamborg and told him, we've actually set a message in  
5 our system so that when the prescription comes up for  
6 K-Dur, the pharmacists are instructed to dispense two  
7 Klor Con 10 products.

8 Q. So, if the prescription was written for K-Dur  
9 20 in the summer of 2001 in that particular chain  
10 account, what would happen when that prescription would  
11 be presented?

12 A. The pharmacist would dispense two Klor Con 10  
13 tablets or two Klor Con 10 for the 20.

14 Q. Would the pharmacist do that by calling the  
15 doctor?

16 A. In this case, Walgreens simply mandated that  
17 they substitute the product, because they didn't have  
18 any of the 20 milliequivalent. I can't say whether or  
19 not each pharmacist called the doctor. Our  
20 understanding was the pharmacists were simply  
21 dispensing two 10s for a 20.

22 Q. Did people in your department have an  
23 understanding from industry sources about why there  
24 might be a shortage of K-Dur 20 product in the summer  
25 of 2001?



1           A. Well, I -- there's a couple of sources of  
2 information. Certainly Schering has a web site, and  
3 we're constantly, you know, looking at our customers to  
4 see what they're doing. I believe there was  
5 information relative to that there. I -- I had heard  
6 about it through the -- someone reading The Pink Sheet.

7           Q. This spike in sales of the Klor Con 10 wax  
8 matrix product, what time period from the beginning to  
9 the end have you seen this increase in demand for Klor  
10 Con 10 over what was budgeted at Upsher-Smith?

11          A. Well, it began around the July time period, and  
12 we're still not caught up, but to my knowledge, we  
13 still have customers who can't get K-Dur. So, you  
14 know, it's difficult -- they have to use something.

15                 Now, of course, post-September 1, they can use  
16 our product, but our production has not caught up with  
17 the demand which started in the summer.

18          Q. And when you're talking about your production  
19 in your last answer, are you talking about Klor Con 8  
20 and 10 mEq wax matrix?

21          A. I am.

22          Q. And I think you testified that the Klor Con M20  
23 has sold well. Can you give me a feel for the range of  
24 sales you've had of the product?

25          A. Well, yes, for example, we sold almost \$40

1 million worth of Klor Con when we launched it in  
2 September, though we couldn't deliver all of that,  
3 because we were catching up with our productivity in  
4 the Klor Con M products as well. I think we sent  
5 out -- shipped out about \$28 million, and so to date,  
6 we have over \$60 million in sales in that.

7 Q. Did every customer that you approached embrace  
8 Klor Con M20 and buy the product?

9 A. I wish they had, but that is not the case.  
10 CVS, for example, does not stock the Klor Con M20  
11 today, they stock Warrick, and they have from the  
12 beginning. Pacificare, which is a very large PBM, they  
13 have a mail order, they actually list K-Dur as the  
14 preferred generic, and they list Klor Con as the brand.  
15 So, in that case, if you were to get a prescription,  
16 you'd actually have to pay more for Klor Con.

17 Q. In that example, are you referring to the M20  
18 Klor Con product?

19 A. Yes.

20 Q. Are you referring to K-Dur 20 as the listed  
21 generic at that account?

22 A. Yes, I am. The other examples would be Medco  
23 and Long's out in -- Long's is a regional chain out in  
24 the west.

25 Q. These are companies that have not made

1 significant purchases of the Klor Con M20 and have  
2 stuck with Schering-Plough. Is that correct?

3 A. And/or Warrick, right.

4 Q. Now, today is February 21st, 2002, is it not,  
5 sir?

6 A. Yes, sir, it is.

7 Q. And do you have an understanding when your 180  
8 days will be up?

9 A. Yes, I do.

10 Q. And when will that be?

11 A. February 28th, 2002.

12 Q. That's about a week away?

13 A. It is.

14 Q. Have you had any indication from your calls on  
15 customers that another company is imminently working on  
16 a launch of a K-Dur 20 product?

17 A. No. Actually, we've asked, and the response  
18 we've had is that they have not heard from any other  
19 companies.

20 Q. Would you expect to hear about that from  
21 customers at this point?

22 A. Absolutely. You -- it takes time to launch a  
23 product, to get it in the system. As I said, it --  
24 wholesalers like 60 days notice and chains would prefer  
25 the same thing. So, when you are going to launch a

1 product, you need to give them notice, you need to put  
2 in competitive pricing, they need to be able to come  
3 back to their current vendors if that's their choice  
4 and see if there's any type of bargaining that they can  
5 do.

6 MR. GIDLEY: Your Honor, I'm at a natural break  
7 point, but I'm happy to continue as well.

8 JUDGE CHAPPELL: It's a good time. Why don't  
9 we take our morning break. We will recess until 11:25.

10 (A brief recess was taken.)

11 JUDGE CHAPPELL: You may proceed, Mr. Gidley.

12 MR. GIDLEY: Thank you, Your Honor. For the  
13 next part of the examination, Your Honor, I'll be  
14 referring to the exhibit binders, and my college, Raj  
15 Malik, if your screen is working, will put the pages of  
16 those documents on the ELMO.

17 JUDGE CHAPPELL: Okay, that's fine, thanks.

18 BY MR. GIDLEY:

19 Q. Mr. Dritsas, may I direct your attention to tab  
20 1 of the Dritsas binder, the large binder. I show you  
21 Exhibit CX 740. Sir, could you identify that?

22 A. Yes, this is a document regarding K-Dur.

23 Q. And this is from the files of Upsher-Smith  
24 Laboratories?

25 A. Yes.

1           Q. And sir, specifically this document covers the  
2 Schering product K-Dur 20. Is that correct?

3           A. Yes.

4           Q. And do you see the second bullet where it says,  
5 "Currently a 79 million dollar product"?

6           A. Yes.

7           Q. Does that give you an ability to place this  
8 document in time, to date the document, approximately?

9           A. Approximately '94.

10          Q. All right. And in the next bullet,  
11 Upsher-Smith wrote, "Targeting both physicians and  
12 pharmacists."

13                 Do you see that?

14          A. Yes.

15          Q. And what does that mean?

16          A. That means the target for Schering, for  
17 example, is physicians and pharmacists.

18          Q. The next bullet says, "Promoting through  
19 Schering's 1200 plus rep sales force and a fully  
20 integrated promotional plan."

21                 Do you see that?

22          A. Yes, I do.

23          Q. And is that with reference to K-Dur 20?

24          A. Yes.

25          Q. And at this point in time, what was the size of

1 your own field sales force?

2 A. We didn't have a field sales force.

3 Q. Now, the next bullet says, "Competes directly  
4 against the 8 and 10 mEq strengths."

5 Do you see that?

6 A. Yes, I do.

7 Q. And what is that a reference to?

8 A. Well, this is positioning K-Dur as a product by  
9 Schering, talking about their market share and so  
10 forth, and then for our interests, it competes against  
11 our 8 and 10 wax matrix products.

12 Q. That's K-Dur 20?

13 A. That's correct.

14 Q. Now, the next bullet says, "Positioned as an  
15 innovator - unique, non-substitutable product."

16 What, sir, does that mean at this time?

17 A. Well, there's two things really. If you look  
18 at "positioned as an innovator," that would refer to  
19 our opinion of how they're marketing their product.  
20 They are trying to position it as a unique -- they're  
21 the innovator, they're trying to position it as a  
22 unique product. And the "nonsubstitutable" part of  
23 this refers to the fact that there are no other A-B  
24 rated products.

25 Q. Now, did that mean that there was no

1 competition for K-Dur 20 at this time?

2 A. No, it means there's no other A-B rated  
3 product.

4 Q. So, therapeutic interchange could occur at this  
5 time through pharmacists. Is that correct?

6 A. Right, but not an A-B rated substitution.

7 Q. And could you also compete by getting the  
8 physician to change his or her prescribing habits?

9 A. Yes.

10 Q. The last bullet says, "Priced competitively."  
11 What does that refer to?

12 A. That refers to the pricing of the K-Dur  
13 product.

14 Q. Specifically, K-Dur 20?

15 A. K-Dur 20, yes.

16 Q. Let me direct your attention now, sir, to tab  
17 2. Would you familiarize yourself with USX 1549  
18 bearing a Bates number USL 13856 through USL 13874 and  
19 bearing the legend on the cover, "Klor Con Tablets,  
20 1996 Marketing Plan."

21 A. (Document review.) Yes.

22 Q. Could you identify USX 1549?

23 A. Yes, this is the marketing plan for 1996 for  
24 the Klor Con tablets. This was prepared by Denise  
25 Dolan in February of 1996.

1 Q. And Ms. Dolan works in your department?

2 A. Yes, she does.

3 Q. And this was a document generated by your  
4 department?

5 A. Yes.

6 Q. And what's the date of the document?

7 A. February 1996.

8 MR. GIDLEY: Your Honor, at this point I would  
9 move the admission of USX 1549.

10 JUDGE CHAPPELL: Any objection?

11 MS. BOKAT: No objection.

12 MS. SHORES: No objection, Your Honor.

13 JUDGE CHAPPELL: USX 1549 is admitted.

14 (USX Exhibit Number 1549 was admitted into  
15 evidence.)

16 BY MR. GIDLEY:

17 Q. Mr. Dritsas, directing your attention to the  
18 page that's been Bates labeled 858, several pages down.

19 A. Yes.

20 Q. The 1996 Klor Con tablets marketing plan reads  
21 in the category Competition, "In the 10/20 mEq market,  
22 K-Tab, Micro-K 10, Ethex and K-Dur 20 are the major  
23 competitors to focus on."

24 Do you see that?

25 A. Yes.



1           Q. And was that your understanding of the  
2 competitors that Upsher-Smith was focusing on at this  
3 period of time?

4           A. Yes, during that time period, as I said, we  
5 looked at the entire KCl market, and we were -- in this  
6 case, what Denise is referring to is this is the major  
7 competition against which she wants to compete with our  
8 Klor Con 10 wax matrix, and that would include the  
9 products that you see listed there, including the K-Dur  
10 20.

11          Q. And those products listed, including K-Dur 20,  
12 were the major competitors to the Klor Con 10 and 8 mEq  
13 tablets?

14          A. Yes.

15          Q. At the bottom, in yellow highlight, reads the  
16 following sentence on 858:

17                "It consists of initiatives for targeting (DDD  
18 data), and renewed focus on managed care, ASCP and high  
19 volume independents."

20                Do you see that?

21          A. Yes.

22          Q. DDD data refers to what, sir?

23          A. That refers to the data that we would retrieve  
24 to focus in on the high prescribers of K-Dur.

25          Q. And when you say prescribers, those would be?

1           A. The physicians who are prescribing K-Dur.

2           Q. "Renewed focus on managed care" refers to what  
3 at this time for Upsher-Smith?

4           A. Renewed focus on managed care, again, would be  
5 going in with a tactic for getting Klor Con 10 as a  
6 formulary preference over K-Dur 20 or Ethex or any of  
7 the other products.

8           Q. And when you say "Klor Con 10" in the context  
9 of this document, you mean the wax matrix product?

10          A. Yes, I do.

11          Q. ASCP, what is that, sir?

12          A. American Society of Consulting Pharmacists, so  
13 what this would indicate is we want also to get a  
14 presence with long-term care and nursing homes.

15          Q. And finally, the phrase "high volume  
16 independents," what does "high volume" refer to, sir?

17          A. Well, those independents that do the highest  
18 volume of business.

19          Q. On the next page appears the following sentence  
20 in yellow on page 859:

21                 "While the various release mechanisms are  
22 considered to be comparable, state and federal laws  
23 typically prohibit substitution between dosage forms at  
24 the pharmacy level. However, therapeutic  
25 interchange -- requiring input from the physician -- is

1 more common in the managed care sector, when a managed  
2 care plan standardizes on a specific product for all  
3 their potassium prescriptions."

4 Do you see that quote, sir?

5 A. Yes, I do.

6 Q. Turning your attention to the first sentence,  
7 the phrase, "the various release mechanisms are  
8 considered to be comparable," what is that referring  
9 to?

10 A. Well, again, it refers to all forms of  
11 potassium are considered to be therapeutically  
12 equivalent. They all deliver potassium. And so in  
13 here, she's just pointing out that various -- the  
14 mechanism doesn't really matter in this case. They're  
15 all considered to be comparable. So, there's no  
16 perceived clinical advantage of one or the other.

17 Q. The rest of the sentence there says, "state and  
18 federal laws typically prohibit substitution between  
19 dosage forms at the pharmacy level."

20 Do you see that?

21 A. Yes.

22 Q. What's your understanding of how you dealt with  
23 that phenomenon at Upsher-Smith at this time for the  
24 Klor Con line?

25 A. Well, when they say that it typically prohibits

1 substitution between dosage forms, again, relating back  
2 to the A-B rated substitution. Therefore, the  
3 pharmacist needs to make a therapeutic choice, and in  
4 some states, they are allowed to do that without  
5 calling the physician, and if they're not, then they  
6 need to make a call to do that.

7 When it says requiring a more common -- it's  
8 more common in the managed care sector, what that's  
9 referring to is that the managed care organization can  
10 limit the use of any product by not having it on  
11 formulary, and they can standardize on their potassium  
12 needs.

13 Q. But even in those instances where substitution  
14 were prohibited, could that be overcome by a phone call  
15 from the pharmacist to the doctor?

16 A. In all cases.

17 Q. Now may I direct your attention, sir, to page  
18 861, several pages down.

19 A. Yes.

20 Q. And again, we're just going to stay with the  
21 yellow highlighting. It says:

22 "Competition: The 10/20 mEq Tablet Market,"  
23 picking up with, "The 10/20 mEq market continues to be  
24 increasingly competitive."

25 Do you see that?

1 A. Yes.

2 Q. Was that your own perception of the marketplace  
3 at this time?

4 A. Yes. Again, I would -- you know, this is a  
5 segment of the overall potassium market, so within this  
6 segment, it was becoming increasingly competitive.

7 Q. And who were the key competitors in that  
8 segment of the potassium market at this time?

9 A. They are identified here as K-Tab, Klotrix,  
10 K-Dur 20 and K-Dur 10.

11 Q. And was at this time Upsher-Smith competing  
12 within this segment, the 10/20 segment?

13 A. Yes.

14 Q. So, was Klor Con 10 competing with K-Dur 10 and  
15 K-Dur 20 at this time?

16 A. Yes, and all of the products listed there.

17 Q. Down below there's a product profile for  
18 Schering which is highlighted, and the second bullet  
19 says on page 861, "Offer competitive pricing."

20 Do you see that?

21 A. Yes.

22 Q. What is that a reference to?

23 A. It references to their pricing strategy.

24 Q. Was that your belief at Upsher-Smith at this  
25 time?

1 A. Yes.

2 Q. And was that true of the K-Dur 20 product?

3 A. Yes.

4 Q. Directing your attention to the next page, sir.

5 A. Yes.

6 Q. What competitors are listed on page 862?

7 A. The Micro-K by A. H. Robbins and then the Ethex  
8 product.

9 Q. And that's E T H E X, correct?

10 A. That's correct.

11 Q. And what was the strategy of Ethex as  
12 understood -- and that is E T E X (sic) -- as  
13 understood by Upsher-Smith at this time?

14 A. Yes, E T H E X.

15 Q. Thank you.

16 A. The strategy position is a quality low cost  
17 substitute. So, in other words, she's saying they have  
18 a similar positioning as Upsher-Smith, but they're very  
19 aggressive in their pricing.

20 Q. The phrase "in similar strategy to Klor Con,"  
21 is that a reference to the 8 and 10 mEq Klor Con wax  
22 matrix tablet?

23 A. That's correct.

24 Q. And at this time were you emphasizing both  
25 quality and low cost?

1 A. We were.

2 Q. The next bullet says, "Aggressive pricing  
3 strategy."

4 Do you see that?

5 A. Yes.

6 Q. Is that your best recollection of what that  
7 company was doing in the marketplace for potassium at  
8 this time?

9 A. Absolutely.

10 Q. Directing your attention, if I may, sir, to  
11 page 64.

12 A. Yes.

13 Q. "Competition Summary: In the 10/20 mEq tablet  
14 market, K-Tab, Klotrix, K-Dur 10 and K-Dur 20 are the  
15 major competitors on which we intend to focus."

16 Do you see that quote, sir?

17 A. Yes, I do.

18 Q. And the reference here to "we" is Upsher-Smith,  
19 is it not?

20 A. Yes, Upsher-Smith, and primarily with our wax  
21 matrix products.

22 Q. And that would be the -- be what?

23 A. The Klor Con 8 and 10.

24 Q. And the Klor Con 8 and 10 would be competing  
25 with what players at this time?

1           A. The K-Tab, Klotrix, K-Dur 10 and then the K-Dur  
2   20.

3           Q. And would those be all of the competitors?

4           A. No, there are many more competitors. What the  
5   product manager is doing in this case is taking that  
6   segment of the market where the -- those prescriptions  
7   are written and saying we are going to go after the  
8   prescriptions for K-Tab, Klotrix, K-Dur and K-Dur 20.

9           Q. And do you agree with this competition summary  
10   on this page?

11          A. Yes.

12          Q. Turning your attention now to the next page,  
13   page 65, bullet two under Assumptions says, "The major  
14   driving forces for our growth and profitability are:  
15   Managed care through drug interchange; wholesalers,"  
16   and I'm abbreviating, chains and mail order.

17                Do you see that?

18          A. Yes.

19          Q. And the first bullet, "Managed care through  
20   drug interchange," is that what you were referring to  
21   earlier?

22          A. That's correct.

23          Q. And how would that work for the Klor Con 8 and  
24   10 products at this time?

25          A. We would go into the managed care and ask that



1     they list our product as a preferred product or ask  
2     that they give consideration to not listing K-Dur.

3           Q. Directing your attention to the sentence that  
4     begins under the third bullet, "We will grow share in  
5     the managed care arena at the expense of all the  
6     potassium products due to therapeutic interchange  
7     (formulary exclusion or restriction)," do you see that?

8           A. Yes.

9           Q. The reference to "all potassium" would that  
10    have included Schering's products, the K-Dur 10 and 20?

11          A. Yes, it does. If you look earlier, we -- in  
12    the first assumption, we talk about the KCl market as  
13    \$218 million. So, the KCl market includes the K-Dur  
14    10, the K-Dur 20 and all of the potassium products.

15                 Now, further, she's segmenting it into the top  
16    competitors that she really wants to focus in on, and  
17    she's listing there in that third point, this is how  
18    we're going to get in there, and managed care would be  
19    one way we're going to do that.

20          Q. And formulary exclusion, what does that refer  
21    to?

22          A. That refers to the tactic where you would -- if  
23    I'm on the formulary with Klor Con and you're not, then  
24    you're excluded from that formulary.

25          Q. Was this something that you were doing versus

1 K-Dur 10 and 20 at this time period?

2 A. Yeah, most specifically to K-Dur 10 and 20.

3 Q. Directing your attention to page 868, "Issue:  
4 In order to grow Klor Con sales it is essential to take  
5 share from the competition."

6 Do you see that?

7 A. Yes.

8 Q. Was that true of Klor Con 8 and 10 wax matrix  
9 tablets at this time?

10 A. Yes.

11 Q. And what did the competition include at this  
12 time?

13 A. Let me just take a look at this for a minute.  
14 Oh, it is all Klor Con tablets. I thought she might be  
15 just talking about the 8 mEq. The -- the competition  
16 would be K-Dur 10, K-Dur 20, the Ethex product, the  
17 Micro-K 8 and 10, probably Klotrix, K-Tab.

18 Q. Underneath Issues, there are a number of  
19 objectives, and I direct your attention to the next  
20 page, page 869.

21 A. Yes.

22 Q. It says, "To defend and grow the Klor Con  
23 market share where we are on managed care formularies."

24 Do you see that?

25 A. Yes.

1 Q. And there are a number of strategies listed.

2 A. Right.

3 Q. The first says, "Offer rebates linked to market  
4 share growth."

5 Do you see that?

6 A. Yes.

7 Q. Is that something you were doing at this time?

8 A. Yes.

9 Q. And a rebate would be what?

10 A. A rebate would be something that we would work  
11 out on a quarterly basis so that, for example, if the  
12 managed care program were to list us as a preferred  
13 product and offer some type of, for example, a lower  
14 co-pay on the Klor Con 10, and within their potassium  
15 market, which would include a number of competitors,  
16 the 20, the 10, the microencapsulated, if we got a  
17 preferred status, we would look at that and we would  
18 say as your market share grows with Klor Con within  
19 your managed care segment, then we will give you some  
20 type of rebate each quarter against mutually agreed  
21 upon objectives that we would set together.

22 Q. And the rebate would involve a cash payment?

23 A. It could. It could -- it really would depend  
24 on the plan. It could be a cash payment. It could be  
25 a credit of some sort. It could be a promotional

1 support.

2 Q. But it was a financial incentive?

3 A. But it was a financial incentive, yes.

4 Q. The next bullet -- the fourth bullet says,  
5 "Offer bulk product at special pricing to targeted  
6 accounts."

7 Do you see that?

8 A. Yes.

9 Q. What is that a reference to?

10 A. That's yet another way to compete in the  
11 market. When you offer bulk, from our standpoint, you  
12 get economies of scale because you're not bottling it  
13 off in smaller units, and so you can also offer more  
14 competitive price on it because of those economies of  
15 scale, and then there's certain mail order  
16 organizations, for example, that have repackaging. So,  
17 we could sell it to them. They could buy our bulk  
18 presentation of 5000s or 10,000, which we would not  
19 sell to a retail pharmacy. They could then repackage  
20 it, and it would be a profitable situation for both of  
21 us.

22 Q. So, just showing you what we've had in this  
23 courtroom, the 500-tablet bottle, the bulk product  
24 would have how many tablets typically?

25 A. Well, typically the bulk product -- a bulk

1 presentation has at least a thousand. In our case with  
2 Klor Con 8 and 10, we have it in 5000s as well as  
3 10,000.

4 Q. What are some customers that have opted for  
5 bulk product of the Klor Con product line?

6 A. WalMart, for example, has a repackager, and  
7 they repackage our products.

8 Q. The next objective says, "To grow Klor Con  
9 market share by gaining formulary status as the  
10 exclusive or preferred potassium."

11 Do you see that?

12 A. Yes.

13 Q. Now, the reference to gaining formulary status,  
14 is that talking about getting into new managed care or  
15 PBM formularies?

16 A. Right.

17 Q. And that might mean excluding another  
18 competitor. Is that correct?

19 A. Well, it does mean excluding another  
20 competitor. It means -- whenever you have as an  
21 objective to gain formulary status as exclusive, that  
22 means we want them to not use K-Dur 20, K-Dur 10,  
23 microencapsulate -- might be Micro 8, Micro 10, any  
24 other product lines. We want them to just use our  
25 product.

1           If we can't get that, you see it says on there,  
2    "or preferred." So, that means, okay, maybe we're both  
3    on the formulary, but you're going to pay this much for  
4    K-Dur and you're going to pay this much in a co-pay for  
5    Klor Con. That's how --

6           Q. You're using your hands. Let me just put that  
7    on the record.

8           A. I'm sorry.

9           Q. If there is a preferred formulary status to  
10   Klor Con versus K-Dur, how would that work? Just use a  
11   numeric example, if you would.

12          A. What I would -- how that would work, then, is  
13   when you went to get your prescription filled, the  
14   pharmacist might say, K-Dur will cost you -- using an  
15   arbitrary number -- \$25. Klor Con will cost you \$5.  
16   That would be preferred.

17                 In the exclusive status, it would simply say we  
18   don't -- we don't cover K-Dur. If you want to pay \$70  
19   out of your own pocket, you can do that, but your plan  
20   does not cover K-Dur.

21          Q. And the two dollar figures you're talking about  
22   would be the co-pay the customer would pay?

23          A. Exactly.

24          Q. So, that would be -- that would give -- in the  
25   instance of a preferred formulary, that might give the

1 customer an incentive to buy your product versus  
2 another?

3 A. That's correct.

4 Q. Including K-Dur?

5 A. Including K-Dur.

6 Q. Going to the next page -- actually, let's move  
7 along to the back of this document. There's a page  
8 872, Mr. Dritsas, entitled Tactical Plan.

9 A. Yes.

10 Q. And underneath Overview, the next page, which  
11 is 873, "Klor Con Tablets sales and profitability are  
12 critical to the success of Upsher-Smith. The tablet  
13 line (brand and private label) provide 64% of the  
14 company's sales but also in the range of 80% of its  
15 profits."

16 Do you see that?

17 A. Yes.

18 Q. In 1996, was the Klor Con product line  
19 important to the success of Upsher-Smith?

20 A. Absolutely, over 80 percent of our profits came  
21 from Klor Con.

22 Q. Was it critical to the success of Upsher-Smith  
23 in 1997?

24 A. Yes.

25 Q. How about 1998?

1 A. Yes.

2 Q. 1999?

3 A. Yes.

4 Q. 2000?

5 A. Yes.

6 Q. And 2001?

7 A. Yes.

8 Q. And that's because it provides both sales  
9 dollars and profit dollars to Upsher-Smith?

10 A. That's correct.

11 Q. In fact, either a majority or a very strong  
12 plurality of the dollars involved?

13 A. That's correct.

14 Q. Let me direct your attention, if I may, sir,  
15 now to tab 3 of the Dritsas exhibit binder.

16 A. Yes.

17 Q. And I show you what's been marked for the  
18 record USX 619.

19 A. Yes.

20 Q. What's this logo on page 1, IMS America?  
21 What's that?

22 A. That's a resource. IMS is the resource for  
23 audits that we get. They provide you with data.

24 Q. And do they do this for free?

25 A. Oh, no, it costs a lot of money to get IMS



1 data.

2 Q. Is IMS used by others in the industry?

3 A. IMS is really to my knowledge the standard in  
4 the industry that most pharmaceutical companies would  
5 use, and they have a number of different tools  
6 available for companies. You can get information in  
7 realtime. You can get information monthly.

8 At this time, we were not able to afford that  
9 kind of update, and so generally we would get data --  
10 information that was dated or what they call aged,  
11 because you get a significant discount if you get aged  
12 data, and they charge the most, in other words, for the  
13 freshest and newest information.

14 Q. So, in 1996, were you buying all of the data  
15 that IMS made available?

16 A. No.

17 Q. How about 1997?

18 A. No.

19 Q. How about 1998?

20 A. No.

21 Q. How about 1999?

22 A. No.

23 Q. How about the years 2000 and 2001?

24 A. No.

25 Q. And that's due to cost?

For The Record, Inc.  
Waldorf, Maryland  
(301) 870-8025

1 A. Yes.

2 Q. Let me direct your attention to the next page.

3 A. Yes.

4 Q. And the condition of this document is such that  
5 the print is a bit fine. Starting on this page, and  
6 without trying to exhaust you or your eyes, could you  
7 read the first phrase, "Selected Market," and then  
8 below that, do you see where it's yellow highlighted?

9 A. Yes. Below that is an identifier number that  
10 IMS uses for potassium chloride.

11 Q. And it begins with a 6?

12 A. Yes, 60110.

13 Q. All right. And listed below, we've highlighted  
14 some of them or some of the competitors. Before we get  
15 to the first one that's yellow highlighted, we see the  
16 reference here to K-Dur. Do you see that in the fifth  
17 line?

18 A. Yes.

19 Q. And that would be the Schering product?

20 A. That's correct.

21 Q. And it looks like the 20 mEq there is listed.

22 Is that correct?

23 A. Yes.

24 Q. And below that is Abbott? Do you see that?

25 A. Abbott Klor.

1 Q. Right. And what was Klor?

2 A. A 20 mEq product.

3 Q. What's the next company listed?

4 A. Upsher-Smith Klor Con.

5 Q. All right. And the next company, sir?

6 A. Wyeth Ayerst.

7 Q. The next company?

8 A. Rugby.

9 Q. Did they have a potassium chloride product?

10 A. Yes.

11 Q. And what was its strength?

12 A. 20 mEq.

13 Q. What's the next company, sir?

14 A. Bajmar.

15 Q. Could you spell that for the record?

16 A. B A J M A R.

17 Q. And the next one, sir?

18 A. Schein.

19 Q. And what sort of product did Schein have in

20 this report?

21 A. 20 mEq.

22 Q. And the next one, can you read the next one?

23 A. Geneva -- oh, I'm sorry, the one above Geneva?

24 I can't read the one above Geneva.

25 Q. Okay, let's skip to Geneva. Did they have a

1 potassium chloride product?

2 A. Yes.

3 Q. And can you read the last two on this page?

4 A. The next one says, "manufacturer not stated,"  
5 the next one says, "Qualitest Products."

6 Q. All right. And we've been reading from USL  
7 14884.

8 A. Yes.

9 Q. And directing your attention very briefly to  
10 the next page, 85, what are some of the competitors in  
11 potassium on that page?

12 A. Alra Labs, Roxane, Copley, Major. I can't  
13 quite read the next two of them.

14 Q. Do you see about six or seven items down  
15 there's an entry that looks like 10 mEq?

16 A. Yes.

17 Q. And below that is what company?

18 A. Key Pharmaceuticals -- well, there's  
19 Upsher-Smith first.

20 Q. And then?

21 A. Key Pharmaceuticals with K-Dur.

22 Q. Okay.

23 A. And then Abbott.

24 Q. And below Abbott?

25 A. Rugby.

1 Q. Turning the page, on the next page, page 886.

2 A. Yes.

3 Q. The first yellow highlighted company there?

4 A. Is Qualitest.

5 Q. All right. And what are some of the other  
6 companies that were selling potassium chloride at this  
7 strength?

8 A. Warner Chilcott, Gold Line, Alra Labs, Major,  
9 Apothecon. I can't make out the others.

10 Q. And just flipping through the rest of this  
11 document, are there a number of potassium chloride  
12 products at the time of this report being marketed in  
13 the U.S.?

14 A. Oh, yes. These are all potassium products.

15 Q. Sir, what's -- what would be your estimate of  
16 the number of companies that were selling potassium  
17 products in 1996?

18 A. Fifty.

19 Q. Certainly more than 10 or 20?

20 A. Certainly more than 10 or 20.

21 Q. All right. May I direct your attention, sir,  
22 to tab 4.

23 A. Yes.

24 Q. USX 626. Why don't you take a minute and  
25 familiarize yourself with that exhibit.

1 A. Okay. (Document review.)

2 Q. And for the record, USX 626 begins with USL  
3 15224 and concludes with USL 15344.

4 A. Where did -- I'm sorry, would you tell me again  
5 where it concludes?

6 Q. It should conclude right before tab 5. The  
7 first page in my binder is 15224, and the last page --  
8 whoops -- is 15245.

9 A. 245, okay.

10 Q. I read ahead. Thank you for the correction.  
11 USX 626 is 15224 to 245.

12 A. Okay.

13 Q. You have had a chance to familiarize yourself  
14 with this exhibit?

15 A. Yes, I have.

16 Q. And what is this exhibit?

17 A. This is the Klor Con tablet 1997 marketing plan  
18 that was submitted by Denise Dolan in December of 1996.

19 Q. And what -- who -- which company had this plan?

20 A. This is Upsher-Smith Laboratories.

21 Q. And did Ms. Dolan work for you in December of  
22 1996?

23 A. Yes.

24 Q. And was this, in fact, the marketing plan for  
25 the company --

1 A. Yes.

2 Q. -- for the year 1997?

3 A. That's correct.

4 Q. And she would have finished her preparation  
5 right around the end of 1996?

6 A. Yes.

7 MR. GIDLEY: I would move the admission, Your  
8 Honor, of USX 626.

9 MS. BOKAT: No objection.

10 MS. SHORES: No objection, Your Honor.

11 JUDGE CHAPPELL: USX 626 is admitted.

12 (USX Exhibit Number 626 was admitted into  
13 evidence.)

14 BY MR. GIDLEY:

15 Q. Sir, may I direct your attention to page 227,  
16 the introduction?

17 A. Yes.

18 Q. The introduction states, "Promotion for 1997  
19 will have a consistent message focusing on the benefits  
20 of the Klor Con line as well as our competitive  
21 pricing."

22 Do you see that?

23 A. Yes.

24 Q. Was that the way that you positioned, in fact,  
25 the Klor Con line in the year 1997?

1 A. Yes.

2 Q. And part of your focus was on pricing?

3 A. Yes.

4 Q. The next paragraph begins, "Price has become  
5 the major factor in the potassium chloride market."

6 Do you see that?

7 A. Yes.

8 Q. And the next sentence reads, "Brands as well as  
9 generics are using price to increase share in this  
10 established market."

11 Do you see that?

12 A. Yes.

13 Q. What do those words mean? What was going on in  
14 the potassium chloride market at this time?

15 A. Well, it was becoming increasingly competitive  
16 within this time period, and I think there were a  
17 number of new competitors in the market, and each year  
18 we seemed to get one or two more, and so even the brand  
19 companies were using price to compete for share.

20 And so what we were saying is that we will be  
21 consistent in our message to say we've always been  
22 economically priced, we've always offered your patients  
23 a lower cost alternative.

24 Q. And how does -- how did firms in 1996 and 1997  
25 use price to gain market share?



1           A. Well, they might use it through rebate  
2 programs, through market share programs. They might  
3 try just lowballing a price in a wholesaler or in a  
4 chain.

5           Q. This reference to "brands as well as generics,"  
6 what are some of the firms being referred to there?

7           A. Well, it would be all of the ones that we saw  
8 with whom we competed, like the K-Dur product, for  
9 example, K-Tab, Slow K, Micro-K.

10          Q. And sir, directing your attention to the next  
11 sentence, "Upsher-Smith will closely monitor the market  
12 and continue to strengthen our position with key  
13 accounts through competitive pricing strategies," do  
14 you see that?

15          A. Yes.

16          Q. What does "competitive pricing" mean here?

17          A. It means that within those key accounts that we  
18 identified, which would be wholesalers, chains, managed  
19 care headquarters, for example, that we are going to  
20 monitor that and then administer, if you will,  
21 competitive pricing strategies to either gain or  
22 maintain business that we have.

23          Q. Did that mean lowering price in some instances  
24 at this time?

25          A. It would.

1           Q. Let me direct your attention to the next page,  
2           the Executive Summary. The report reads, "In the 10/20  
3           mEq market, the focus has been on price with continued  
4           growth from generics such as Ethex," E T H E X, "and  
5           new entries from Apothecon, ESI Lederle, Medeva," M E D  
6           E V A, "and Biocraft in 1996."

7                     Do you see that?

8           A. Yes, I do.

9           Q. And sir, had entry occurred within the  
10          potassium chloride market in 1996?

11          A. Yes. These were several of the companies who  
12          now were offering potassium.

13          Q. And indeed, within the overall potassium  
14          market, specifically within the 10/20 market segment,  
15          what firms had entered in 1996 and begun selling  
16          potassium chloride?

17          A. The new entries were Apothecon, ESI Lederle,  
18          Medeva and Biocraft.

19          Q. What was Apothecon's reputation as a  
20          competitor?

21          A. Very low-priced competitor.

22          Q. And we're talking about potassium here?

23          A. In this case we are. Apothecon has a large  
24          breadth of generic products.

25          Q. And specifically in the 10/20 mEq segment. Is

1       that correct?

2           A.   That's right.

3           Q.   All right.  And ESI Lederle, Medeva and  
4   Biocraft, they had also entered this segment in 1996?

5           A.   Yes.

6           Q.   The next sentence says, "The major brands have  
7   started to trade price for volume to compete with  
8   strong generic competition."

9                   Does that sentence refer to the 10/20 mEq  
10   market segment?

11          A.   It does.

12          Q.   And what would have been the major brands in  
13   that market segment at this time period?

14          A.   K-Dur 10, K-Dur 20, Micro-K 8, Micro-K 10, Slow  
15   K, K-Tab, Klotrix were some of them.  I'm probably not  
16   naming them all.

17          Q.   Let me direct your attention now to page 234.  
18   The page is entitled Competition.

19          A.   Yes.

20          Q.   The yellow highlighted sentence reads, "The 10  
21   mEq tablet segment has become increasingly competitive  
22   with pricing competition from the branded products as  
23   well as new entries such as Apothecon."

24                Do you see that?

25          A.   Yes.

For The Record, Inc.  
Waldorf, Maryland  
(301) 870-8025

1 Q. Is that your understanding of what was going on  
2 in that market segment?

3 A. Yes.

4 Q. And it says, "We plan to continue to pursue  
5 competitors such as Ethex and ESI Lederle as  
6 opportunities by focusing on therapeutic substitution  
7 through managed care formularies and pharmacists."

8 Do you see that?

9 A. Yes.

10 Q. And what does "therapeutic substitution" refer  
11 to?

12 A. Again, this would refer to the products that  
13 Ethex and ESI Lederle have would not be A-B rated to  
14 our Klor Con 10, so we would be going to get a  
15 therapeutic substitution and through the strategies  
16 that we do with managed care and with pharmacists.

17 Q. Directing your attention to the top of page  
18 235, also contained within USX 626, the 1997 Klor Con  
19 tablets market plan, the first sentence reads at the  
20 top of the page, "The 10/20 mEq Market -- The trend in  
21 the KCl market is toward 10 and 20 mEq slow-release  
22 tablet with emphasis on price and dosing flexibility.  
23 This market continues to be increasingly competitive."

24 Do you see that?

25 A. Yes.

1 Q. Is that your understanding of what was going on  
2 in that market segment at this period of time?

3 A. Yes, it is. If you looked at the market as a  
4 whole, the K-Dur 20, for example, was gaining at the  
5 expense of the 8 and 10 and other forms of potassium.  
6 So, in this case, she's pointing out the trend in the  
7 whole market is towards the 10 mEq and 20, so you'd see  
8 diminished market share, for example, in the 8 mEq  
9 prescriptions, emphasizing the price and dosing  
10 flexibility.

11 Q. Now, when there's a trend towards 20 mEq at  
12 this period of time, what's that a trend towards?

13 A. The market -- the prescriptions are being  
14 written for K-Dur. There's a trend of dispensing them  
15 in K-Dur at the expense of the other products.

16 Q. And when you say there's a trend, where's the  
17 trend coming from? What's it taking share from?

18 A. It's taking share from the other potassium  
19 products. So, for example, in this case, Denise would  
20 be worried about the share it's taking from her 8 and  
21 10 wax matrix.

22 Q. The Klor Con Upsher product?

23 A. The Klor Con wax matrix.

24 Q. Now, who were the participants in the 10/20 mEq  
25 market segment at this time?

1           A. Well, she has a number of them. K-Dur 10 and  
2           20 are the first that she identifies, and then Micro-K  
3           10, the Ethex 10, and then there are a number of  
4           others.

5           Q. Now, at this period in time, what did you think  
6           Key might do to counter generic competition, and  
7           directing your attention to the third bullet on this  
8           page underneath K-Dur 10 and 20.

9           A. The thought was that Key might take defensive  
10          action to counter that. In other words, we were trying  
11          to anticipate what type of defensive moves they would  
12          make from their sales and marketing group. Certainly  
13          they had the resources to do market share programs, to  
14          step up promotional efforts. They have a very large  
15          product line that would potentially disadvantage us if  
16          we were to go head to head. And so in here she's  
17          talking about we have plans in place to respond to  
18          that.

19          Q. And I'm sorry, USL refers to what there?

20          A. USL refers to Upsher-Smith Laboratories.  
21          That's our internal acronym that we use.

22          Q. And you're responding to which firm?

23          A. We're responding to Key/Schering with any type  
24          of offensive or defensive moves. They might choose to  
25          continue to grow their share at the expense of our 8

1 and 10 or defend their share.

2 Q. And what products would you be responding to  
3 from Schering?

4 A. The K-Dur 10 and 20 in this case.

5 Q. Now, I notice -- I don't mean to embarrass you,  
6 but it says, "USL will has plans." Have you got typos  
7 in this document? Does that happen at your company?

8 A. Yes, it does.

9 Q. Let me direct your attention to the Ethex  
10 portion of this document. It says, "Ethex 10 mEq  
11 capsule. Strategy -- Positioned as a quality, low-cost  
12 substitute (similar strategy to Klor Con); Pursuing and  
13 gaining market share from capsules as well as tablets."

14 Do you see that?

15 A. Yes.

16 Q. Is that your understanding of the market at  
17 that time in terms of the impact of the Ethex firm?

18 A. Yes, so what they are saying is they want to do  
19 a similar strategy that we do. The Ethex -- or Ethex  
20 as I call it -- product, it's really only A-B rated to  
21 Micro-K, and what they were doing is trying to get  
22 share from other products, like Klor Con 10, you know,  
23 for which they were not A-B rated. So, they are doing  
24 a similar strategy.

25 Q. And directing your attention to the headline

1       there, it's "Ethex 10 mEq capsule."

2               Is that right?

3       A.   Yes.

4       Q.   So, you have got capsules and tablets mixed in  
5       this market segment?

6       A.   Yes.

7       Q.   Are they all competing?

8       A.   Yes.

9       Q.   It also says, "Aggressive pricing strategy."

10       Do you see that?

11       A.   Yes.

12       Q.   Do you agree with that characterization of what  
13       this firm was doing at that time?

14       A.   Absolutely.

15       Q.   Now, directing your attention to the next page  
16       of the 1997 Klor Con tablet Upsher-Smith marketing  
17       plan, do you see the language "Challenges" and  
18       "Opportunities"?

19       A.   Yes.

20       Q.   The first one reads, "To grow Klor Con Tablet  
21       market share and increase Upsher-Smith's overall share  
22       in the potassium market."

23       Do you see that?

24       A.   Yes.

25       Q.   Was that your strategy, to take share from



1 anyone who was selling potassium products at this time?

2 A. Absolutely. We looked at the entire market,  
3 and we were looking to see how we could gain share in  
4 all segments of the market.

5 Q. It says in the first sentence, "Klor Con has  
6 shown consistent growth in a relatively flat market."

7 Do you see that?

8 A. Yes.

9 Q. Is that the reason for the reference to "market  
10 share" and "gaining market share" from others?

11 A. Yes.

12 Q. It says, "Upsher-Smith is counting on this  
13 growth to continue to drive company sales."

14 At this point in time, was it the avowed plan  
15 of Upsher-Smith to grow its share of the potassium  
16 market?

17 A. Yes, it was, and it remains today.

18 Q. Now, this is under Challenges, the sentence or  
19 the bullet concludes with, "We are challenged both  
20 internally and externally," skipping over a few words,  
21 "by increased competition in the market."

22 Do you see that?

23 A. Yes.

24 Q. And was that Ms. Dolan's view of the market?

25 A. Yes, we had -- I think she had stated, we had

1 the increased trend towards the 10 and 20 mEq at the  
2 expense of the 8 and 10 wax matrix. We had a number of  
3 new competitors who were now suddenly on the market.  
4 So, there was an increasingly competitive environment,  
5 and this was our biggest product and one that we  
6 depended on in order to sustain profits and to grow the  
7 future of the company.

8 Q. And was that your view of the potassium market  
9 in 1997?

10 A. Absolute -- yes, it was.

11 Q. The next bullet reads, "Increased competition  
12 in the potassium market place.

13 "Upsher-Smith is faced with increased  
14 competition in this market through price as well as new  
15 entries in the market. Competitors such as Ethex and  
16 ESI Lederle are aggressively going after share in the  
17 KCl market."

18 Do you see that?

19 A. Yes.

20 Q. Ethex and ESI Lederle were new entrants. Is  
21 that correct?

22 A. Yes.

23 Q. Was it relatively easy in your view for them to  
24 enter this market?

25 A. It's relatively easy to enter the potassium

1 market. We -- you know, when we added our Klor Con  
2 effervescent, for example, we simply contacted someone  
3 to make it for us, and we were on the market.

4 Q. Was it -- I'm sorry.

5 A. So, these people could enter the market -- to  
6 my knowledge, Ethex didn't have a field force, for  
7 example, and they had -- they really didn't have a  
8 sales and marketing effort.

9 Q. And did you view the potassium marketplace as  
10 having ease of entry in 1997?

11 A. It did have ease of entry in 1997, yes.

12 Q. That was your view?

13 A. That's my view.

14 Q. Directing your attention to the phrase  
15 "Opportunities," the second half of this page, "1.  
16 Upsher-Smith commitment to potassium," it says, "Klor  
17 Con is a major product for Upsher-Smith and we will to  
18 continue support of product with investments in plant,  
19 sales efforts and promotion."

20 Do you see that?

21 A. Yes.

22 Q. And was the company, in fact, doing that and  
23 putting resources behind potassium in 1997?

24 A. Yes.

25 Q. The second sentence reads, "We plan to

1 capitalize on this opportunity by employing internal  
2 and external resources to develop innovative selling  
3 programs and identifying potential markets to target  
4 for current as well as future products."

5 Do you see that?

6 A. Yes.

7 Q. And what were some of the selling programs you  
8 were using at this point in time?

9 A. Ah, the selling programs would have included  
10 internally, we do -- were doing free good promotional  
11 programs, for example, that we would do during our  
12 calls to independent pharmacists, where we offered the  
13 product on deal, but if they purchased a certain  
14 quantity and with a certain frequency, we might offer  
15 free goods that we would send out to them.

16 In the managed care programs, we might offer  
17 market share programs. Within chains, we were offering  
18 rebates in order to fend off competitive offers, for  
19 example.

20 Q. I direct your attention to the next bullet. It  
21 says, "2. The addition of bulk presentations to the  
22 Upsher-Smith potassium tablet line.

23 "The addition of bulk for Klor Con Tablets and  
24 private label potassium will allow Upsher-Smith to gain  
25 new business and maintain existing accounts in an

1       increasingly competitive environment."

2               Do you see that?

3           A.   Yes.

4           Q.   Was that a discussion of the potassium tablet  
5   market segment?

6           A.   Yes, the potassium -- actually, the addition of  
7   the bulk tablets and private label potassium really  
8   would compete within the potassium market.

9           Q.   And was this a new product at this point in  
10   time that you were introducing?

11          A.   The bulk presentation was new.

12          Q.   Was it very costly to offer a bulk product in  
13   addition to what you had already been selling?

14          A.   Not from my perspective.

15          Q.   Do you think it was for Upsher-Smith at this  
16   time?

17          A.   No.

18          Q.   Let me direct your attention to page 238, which  
19   is in the portion of the marketing plan for Klor Con --

20          A.   May I -- may I ask a question?

21          Q.   Sure.

22          A.   Or can I clarify a statement?

23          Q.   Yes.

24          A.   Because it's bothered me ever since I answered  
25   it.

1 Q. Please.

2 A. And that is under the first point where it's --  
3 for Opportunities, where it says, "Upsher-Smith has a  
4 major product -- Klor Con is a major product for  
5 Upsher-Smith. We will continue to support of product  
6 with investments in plant, sales efforts and  
7 promotion."

8 Q. Right.

9 A. I don't want to misspeak here in answering that  
10 question to say that we were committed to investments  
11 at that point in time in the plant and other things.  
12 The point that this manager -- that this product  
13 manager is making is that in order to support Klor Con,  
14 we need to continue to invest in these things, and I  
15 just didn't want to answer incorrectly to say that we  
16 were actually making the investments at this time and  
17 doing that, because we weren't.

18 Q. Is it your interpretation or your view that  
19 this language is talking about investments in plant,  
20 sales efforts and promotion over time?

21 A. Exactly, and I just wanted to make sure I was  
22 clear on that.

23 Q. I appreciate that.

24 If I may direct your attention now to page 238,  
25 Strategies.

1 A. Yes.

2 Q. Again, in the Klor Con marketing plan for 1997.

3 "The primary focus for Klor Con promotion will  
4 continue to be on the pharmacist with specific  
5 targeting of managed care, high volume independents and  
6 select chain pharmacists."

7 Do you see that?

8 A. Yes.

9 Q. Why were you focusing on pharmacists at this  
10 period of time?

11 A. The pharmacists would be able to make the  
12 therapeutic substitutions. We were capitalizing on the  
13 customer base that we were building with the  
14 independents, and as you can see, it's not just  
15 pharmacists, because there's managed care in there as  
16 well.

17 Q. And directing your attention to I believe it's  
18 the next paragraph, and I'm going to just abbreviate  
19 this, Klor Con will be promoted specifically to  
20 independents through deals and telesales campaigns  
21 three times during the year.

22 Do you see that?

23 A. Yes.

24 Q. And the independents there refers to  
25 independent pharmacists?

1           A. Yes.

2           Q. And the final sentence of that paragraph says,  
3       "The deals focus on retail pharmacists, offering  
4       discounts directly to stores to increase stock,  
5       substitution and dispensing."

6           Do you see that?

7           A. Yes.

8           Q. And what is that a reference to, the phrase  
9       "offering discounts directly to stores to increase  
10      stock, substitution and dispensing"? What's going on  
11      there?

12          A. The free goods that I talked about earlier,  
13      that would be referencing that. So, in other words,  
14      we're not offering them something through their  
15      wholesaler to discount it. They would purchase from us  
16      on deal, but then if they had a certain volume or a  
17      certain frequency, we would send out to them free goods  
18      directly to them.

19          Q. So, in other words, they got a discount or a  
20      financial incentive if they increased stock,  
21      substitution or dispensing of your Klor Con product  
22      line?

23          A. That's correct.

24          Q. The next paragraph refers to the national  
25      account group and chains. Do you see that?



1 A. Yes.

2 Q. And chains there is -- are those chain  
3 pharmacies? What's that a reference to?

4 A. The chains would be the drug chains like  
5 Walgreens, CVS and so forth.

6 Q. The next paragraph, "Klor Con supports the  
7 managed care goal of improved patient outcomes while  
8 providing a quality product at a competitive price.  
9 Since therapeutic interchange is common in this segment  
10 the promotion will emphasize:

11 "The potassium line that can offer managed care  
12 plans substantial savings, high quality and patient  
13 support plans to maintain compliance."

14 Do you see that?

15 A. Yes.

16 Q. Was part of your marketing message in 1997 that  
17 you would be able to achieve and maintain compliance  
18 with hypokalemic patients through the use of Klor Con?

19 A. Yes.

20 Q. The next sentence describes another strategy.  
21 "Once we have obtained preferred formulary status, we  
22 plan physician promotion to drive prescriptions and  
23 increase patient education programs."

24 Do you see that?

25 A. Yes.

1 Q. And what is that referring to?

2 A. Well, that would be something we would do in  
3 conjunction with the plan, if -- once we achieved that  
4 formulary status, then we would work with the  
5 physicians and the patients and the plan to provide to  
6 the -- to them any educational support, samples, for  
7 example, or other things that they would need in order  
8 to successfully give their patients the Klor Con and  
9 switch them over.

10 Q. Now let me direct your attention to the next  
11 page, Tactics.

12 A. Yes.

13 Q. And in highlight is, "Telephone Sales/Deal  
14 Promotion." There is reference made here to the Klor  
15 Con deal that's been restructured with several  
16 objectives. The first says, "Increase the number of  
17 stores buying the deal from 7,000 to 12,000."

18 Do you see that?

19 A. Yes.

20 Q. What do those 7000 and 12,000 refer to?

21 A. That refers to the number of independent  
22 pharmacies during a four-week period of time for whom  
23 we would actually take the order and place it with the  
24 wholesaler.

25 Q. And the next phrase, "Increase the amount

1 purchased by each store by four or five times."

2 Do you see that?

3 A. Yes.

4 Q. Is that referring to four or five fold or  
5 something else?

6 A. Four or five fold.

7 Q. Okay. And then finally, the reference to the  
8 method is, "The strategy is to offer buying pharmacists  
9 a direct cash payment rebate, paid by check, rather  
10 than offering 16 2/3% off invoice to the wholesaler."

11 Do you see that?

12 A. Yes.

13 Q. And is that your recollection of a promotion  
14 that you ran in 1996 or '97?

15 A. It was one of the promotions we ran.

16 Q. All right, let me direct your attention to the  
17 next page. I'm going to skip some of the tactics.  
18 Let's go to the direct mail tactic that's second on  
19 that page.

20 A. Yes.

21 Q. The marketing plan for Klor Con says,  
22 "Upsher-Smith will target high potassium dispensing  
23 pharmacies with direct mail programs."

24 Do you see that?

25 A. Yes.

1           Q. How did you locate those high potassium  
2           dispensing pharmacies?

3           A. The DDD data, the IMS data.

4           Q. Does DDD data come from IMS?

5           A. It does.

6           Q. And you have to purchase it?

7           A. Yes.

8           Q. And you purchase it and then use the IMS data  
9           to direct your marketing campaign. Is that correct?

10          A. That's correct. So, what we would do is buy a  
11          one-time list, and then -- because that's more  
12          economical, and the list then would indicate to us, you  
13          know, who are the top dispensing pharmacies in this  
14          case. I think they use a numeric range of 10 to 0 or  
15          something like -- well, there is no 0 in potassium, but  
16          10 to 1. So, we would highlight 7 through 10, and  
17          those would be the pharmacies that we would focus our  
18          efforts on, because they dispense the most potassium  
19          products, K-Dur 20, K-Dur 10, Micro-K, whatever  
20          competing product they have.

21          Q. And finally at the bottom of the page there is  
22          references made to journal advertising.

23          A. Yes.

24          Q. And such publications as Drug Topics, Pharmacy  
25          Times, et cetera. Do you see that?

1 A. Yes.

2 Q. And what was the purpose of that campaign in  
3 potassium at this time for Klor Con?

4 A. That was a media campaign to support the  
5 promotional message to the pharmacists.

6 Q. Directing your attention to the next page,  
7 15241.

8 A. Yes.

9 Q. And this is of the 1997 marketing plan, this  
10 page is entitled Budget. Do you see that?

11 A. Yes, I do.

12 Q. And it says, "The promotional budget for 1997  
13 is \$340,000."

14 Do you see that?

15 A. Yes.

16 Q. And that was the budget for the Klor Con  
17 product line?

18 A. Yes.

19 Q. And at this point in time, was that a major  
20 commitment for your company?

21 A. Yes.

22 Q. Was this the largest promotional budget that  
23 you had for all your products?

24 A. I don't recall specifically, I'm sorry.

25 Q. And was there a trend -- directing your

1 attention to the budget for previous years, 1994, '95,  
2 '96 and the projection for 1997, had the company at  
3 this time put increasing resources behind potassium  
4 marketing for Klor Con?

5 A. Yes, we had.

6 Q. And in 1994, what had you budgeted for Klor Con  
7 marketing?

8 A. \$164,000.

9 Q. And by 1997, that was increasing to \$340,000.  
10 Is that correct?

11 A. \$340,000.

12 Q. Almost -- more than double?

13 A. Yes.

14 Q. Let me direct your attention to USX 630, and if  
15 I could ask you, Mr. Dritsas, to just quickly  
16 familiarize yourself with this document. I'm going to  
17 focus my questions on the first several pages.

18 Sir, can you identify or describe what USX 630  
19 is?

20 A. Well, it appears to be information probably  
21 from a training manual. It is not an entire document  
22 in and of itself. For example, there's different years  
23 in here. There's references to '94 data, '97, '95, but  
24 this was all probably taken from training manuals.

25 Q. All right. Let me direct your attention

1 several pages down to page 331 through 333.

2 A. Yes.

3 Q. And the title of 331 reads, "Potassium Chloride  
4 Market, 6/3/97."

5 Do you see that?

6 A. Yes.

7 Q. Was this document prepared on or about June of  
8 '97?

9 A. That's correct.

10 Q. And along the left-hand column, do you see a  
11 variety of products?

12 A. Yes.

13 Q. And the first product listed is Klor Con 10?

14 A. Yes, it is.

15 Q. That's your wax matrix product?

16 A. Yes, it is.

17 Q. And then there's K-Tab 10.

18 A. Yes.

19 Q. Klotrix 10.

20 A. Kaon-Cl.

21 Q. What else?

22 A. Apothecon, Micro-K 10, ESI Lederle, Medeva,  
23 Ethex, K-Dur 10 mEq, K-Dur 20 mEq, K-Plus 10.

24 Q. And that final one, K-Plus 10, was from what  
25 company?

1 A. Alra.

2 Q. And sir, did your company compete with all of  
3 these products?

4 A. Yes, we did. Alra I think was a new entry that  
5 year, but we competed with all of them.

6 Q. And is this list exhaustive of the products  
7 that you were competing with in the potassium chloride  
8 market?

9 A. No.

10 Q. I direct your attention to the next page, there  
11 is a listing of some 8 mEq products. Do you see that?

12 A. Yes.

13 Q. Could you read those into the record quickly?

14 A. Sure. Klor Con 8, Slow K, Copley 8, Warner  
15 Chilcott 8, Kaon-Cl 8, Abbott 8, Micro-K 8 and K-Plus  
16 8.

17 Q. And directing your attention to the next page.

18 A. Yes.

19 Q. Potassium chloride powder, and what products  
20 are listed in that first grouping of boxes?

21 A. Klor Con 20 mEq, Klor Con 20 mEq, Klor powder  
22 20 mEq, Kayciel powder and Klor-Ves powder 20 mEq.

23 Q. And who sold Klor powder at this time?

24 A. Klor at that time was sold by Abbott.

25 Q. Was Abbott quite a bit larger than your



1 company?

2 A. Yes, Abbott is a major multibillion dollar  
3 pharmaceutical company.

4 Q. And in effervescent, there's a reference to  
5 your product and a product from another company, is  
6 that Apothecon?

7 A. That's right, Klor Con/EF and then K-Lyte.

8 Q. All right. Let me direct your attention now,  
9 if I could, to tab 6. Tab 6 is USX 643, Mr. Dritsas.

10 A. Yes.

11 Q. And it begins on page 16064 and concludes on  
12 16158. Do you see that?

13 A. Yes.

14 Q. All right. We're not going to cover every  
15 page. What is USX 643, sir?

16 A. This is the 1998 marketing plan for -- if I can  
17 just take a moment, please, to look at it. (Document  
18 review.) This is the niacin franchise submitted for  
19 Upsher-Smith.

20 Q. Well, directing your attention to page 16085.

21 A. Yes.

22 Q. There's discussion there of the "Potassium  
23 Franchise." Do you see that?

24 A. I do. We have -- if I can just take a moment.

25 Q. Yes, please.

For The Record, Inc.  
Waldorf, Maryland  
(301) 870-8025

1           A. (Further document review.) This is a  
2        compilation of overviews used for planning period --  
3        purposes, excuse me, where we look at promoted  
4        products, and I have not looked through every page, but  
5        it appears to me that we go through various promoted  
6        products and then the tactical plans that we would do  
7        to support those products. So, it should include, for  
8        example, in the beginning, niacin. As you pointed out,  
9        the Klor Con is next. There should be other products  
10       included in this as well. Prevalite follows.

11       Q. But this is a document that relates to your  
12       promoted products at Upsher-Smith, sir. Is that  
13       correct?

14       A. That's right.

15       Q. All right. Let me direct your attention to  
16       page 16085, the Potassium Executive Summary.

17       A. All right.

18       Q. And this document, sir, was prepared on or  
19       about December 15, 1997. Is that correct?

20       A. Yes.

21       Q. And it's the 1998 plan for the Klor Con bulk  
22       and private label tablets. Is that correct?

23       A. Yes.

24       Q. Directing your attention to the first  
25       highlighted sentence, "Sales in the total KCl market

1       were relatively flat for several years with a trend  
2       toward the 10 and 20 mEq strengths. Market leaders  
3       have begun to trade price for volume to reverse their  
4       downward trend, while the role of generics becomes more  
5       important in this market."

6               Do you see that?

7           A. Yes.

8           Q. Do you see where it says, "a trend towards 10  
9       and 20 mEq strengths"?

10          A. Yes.

11          Q. Now, the trend toward 20 mEq strengths would be  
12       toward what product at this time?

13          A. At that time, K-Dur 20.

14          Q. All right. And because it's a trend, where  
15       were those sales coming from?

16          A. They were coming from the 8 and 10 primarily.

17          Q. Eight and 10 mEq tablets?

18          A. Yes, I'm sorry, wax matrix.

19          Q. Now, the next sentence says, "The 20 mEq  
20       segment is holding an ASP of 0.34/tablet verses (sic)  
21       the dramatically eroding ASP in the 8 and 10 mEq  
22       markets."

23               Do you see that?

24          A. Yes.

25          Q. Now, the reference to 8 and 10, is that to your

1 own internal ASP for Upsher-Smith?

2 A. No, the ASP in this case was something we would  
3 have looked at for the 20 mEq K-Dur product.

4 Q. Okay. That first part of the sentence refers  
5 to an ASP that somebody calculated at your firm?

6 A. Right. The way in which they would come up  
7 with an ASP is not very scientific, but it would be the  
8 only method we would have since we don't have access to  
9 their pricing. The product manager might look at the  
10 whole market as described by IMS. So, to begin with,  
11 it's slightly faulted, because IMS does not track  
12 WalMart, for example, but we would take that as a  
13 basis, and then we would take the entire dollars, and  
14 we would simply divide that by the amount of units that  
15 they're showing, and then we would say, well, that  
16 gives us roughly an average selling price.

17 Q. And at this point in time, when Ms. Dolan and  
18 others prepared this document, did they know the actual  
19 selling price of K-Dur 20?

20 A. No, you -- you wouldn't be able to figure out  
21 the average selling price by that calculation, because  
22 you don't know additional discounts, free goods, market  
23 share programs, rebates, any of those other things that  
24 are in there, but it would -- it would serve the  
25 purpose that she's looking at.

1           Q. Now, you mentioned that IMS data does not  
2 include WalMart. Did I get that correct?

3           A. That's right.

4           Q. In your experience in approaching and trying to  
5 sell potassium to WalMart, do they tend to be  
6 price-conscious in your experience?

7           A. Very price-conscious.

8           Q. Do they try to get low prices?

9           A. You go to WalMart if you want low prices, yes,  
10 sir.

11          Q. All right. May I turn your attention to the  
12 next page?

13          A. Yes.

14          Q. The highlighted language is, "USL will continue  
15 to promote to pharmacists, targeting high volume  
16 independents and select chains."

17               Do you see that?

18          A. Yes.

19          Q. Was that part of your strategy in late 1997,  
20 early 1998?

21          A. Yes.

22          Q. And it says, "Klor Con will remain a major  
23 product for USL throughout 1998."

24               Do you see that?

25          A. Yes.

1 Q. Was that true when this document was written?

2 A. Yes.

3 Q. Was it true, in fact, during 1998?

4 A. Yes.

5 Q. Was that a major emphasis in your job and role  
6 at Upsher-Smith?

7 A. Absolutely.

8 Q. The sentence ends, "so it is imperative to  
9 protect the brand and support the product where  
10 necessary."

11 Do you see that?

12 A. Yes.

13 Q. And is that something that you did for the Klor  
14 Con franchise in potassium in 1998?

15 A. Yes, the potassium line from powder,  
16 effervescent, 8 and 10, they were still in 1998 the  
17 majority of our share of -- excuse me, the share of  
18 dollars, if you will, and I think contributing most of  
19 the profits. So, clearly if you're head of the sales  
20 and marketing area, your performance, my performance,  
21 my bonus, my incentives, were all based heavily on our  
22 ability to maintain share and find new business for  
23 Klor Con.

24 Q. Let me direct your attention to the next page  
25 where there is a SWAT analysis, strengths, weaknesses,

1 opportunities, threats. Do you see those boxes?

2 A. I do.

3 Q. Under Opportunities, it says, "Target MD's with  
4 high blood pressure story."

5 What's that a reference to, sir?

6 A. It's in reference to getting the doctors to  
7 write for potassium, and in this case I assume we will  
8 buy the list.

9 Q. Under Threats, the first two bullets say,  
10 "Increased competition in KCl market place; Increased  
11 price sensitivity and generic pricing."

12 Do you see that?

13 A. Yes.

14 Q. And was that your view of the potassium  
15 marketplace in late 1997?

16 A. Yes.

17 Q. And the final threat is, "Trend toward 20 mEq."

18 Do you see that?

19 A. Yes.

20 Q. And what did that mean for Upsher-Smith?

21 A. What that meant was that we had to focus  
22 efforts on going after the 20 mEq business. The threat  
23 generally, you list threats as external things outside  
24 of your internal environment, and in this case we're  
25 once again pointing out that there's a trend toward

1       that market.

2               Now, the market itself isn't growing, so  
3       they're taking away from 8 and 10 and other parts of  
4       potassium. So, the threat then should be put into an  
5       action plan by the product manager to say, if that's a  
6       threat, how are you going to go against that threat?

7               Q. And were you selling a 20 mEq product at this  
8       point in time, late 1997?

9               A. Other than our potassium powder, no, we weren't  
10       selling a tablet.

11              Q. So, the trend towards 20 mEq, what do you  
12       interpret that to mean? What's the threat referenced  
13       here?

14              A. The K-Dur, the trend towards the K-Dur product.

15              Q. And that was a threat to Klor Con?

16              A. Yes.

17              Q. The Issues/Imperatives, the second one is,  
18       "There is increased competition in the chains and  
19       independents from generics, specifically Apothecon."

20              Do you see that?

21              A. Yes.

22              Q. Is that what you recall about the Apothecon  
23       firm at this time?

24              A. Yes, I do. They entered into the market, and  
25       they immediately started gaining share. They were very



1       fiercely competitive from my viewpoint in terms of  
2       their pricing.

3           Q.   Let's go on to tab 7, if we could.

4           A.   Okay.

5           Q.   USX 498.   USX 498 is a memo to Bob Coleman from  
6       Denise Dolan dated June 15, 1998.

7           A.   Yes.

8           Q.   Do both of these individuals work in your  
9       department or were they in other areas in the company?

10          A.   They both worked for me.   Bob Coleman is the  
11       director of marketing.

12          Q.   And Ms. Dolan, do you remember what her title  
13       was at this time?

14          A.   I believe she was the product manager.

15          Q.   Was she on the sales side or the marketing  
16       side?

17          A.   Denise is on the marketing side.

18          Q.   All right.   In the second grouping of bullets  
19       comes the following language:   "It is imperative to  
20       maintain the customer base for Klor Con."

21               Do you see that?

22          A.   Yes.

23          Q.   Was this your view in June of 1998 as well?

24          A.   Yes.

25          Q.   It says, "The strength of the Klor Con market

1 share," I'm on the fifth bullet I think it is, "will  
2 directly impact our ability to sell M20."

3 Do you see that?

4 A. Yes.

5 Q. Why are you concerned about M20 in June of 1998  
6 given the existence of the settlement agreement that  
7 would put the entry date into the future for M20?

8 A. Well, because it gave us a date on which we  
9 knew we would be able to come out with the product, and  
10 we were building our physician base. We were using  
11 Klor Con to get into there with our 10 mEq, and so  
12 Denise's viewpoint would be that we need to make sure  
13 that we are well established. We need to expand our  
14 presence there in anticipation of future line  
15 extensions.

16 Q. Was that your viewpoint as well?

17 A. Yes.

18 Q. The final bullet says, "We should continue to  
19 target K-Dur 10 and 20 pharmacy customers with the Klor  
20 Con 10 message."

21 Do you see that?

22 A. Yes.

23 Q. What was the -- what's that a reference to?

24 A. Well, we were targeting the pharmacy customers  
25 and telling them about the reasons to make a

1 therapeutic substitution for every K-Dur prescription  
2 that they got for 20 mEq, to use two of our 10s, and we  
3 were pointing out in here that we need to continue that  
4 tactic to support the strategy.

5 Q. Turning to the next page, reference is made in  
6 the highlighted portion on page 872, "We have looked  
7 into purchasing the physician data for K-Dur 20."

8 Do you see that?

9 A. Yes.

10 Q. Why would you buy physician data -- why would  
11 you consider buying physician data in June of 1998 for  
12 K-Dur 20?

13 A. So that we could direct our efforts towards the  
14 high prescribers of K-Dur on a broader basis. We could  
15 use this information, for example, to do direct mail  
16 programs, to call on them. There are ways in which we  
17 could promote our 10 mEq. The data is expensive. It's  
18 \$10,000. So, you know, Denise is pointing out in here  
19 that that's one of the things we could do.

20 Q. The -- skipping down to the next highlighted  
21 portion, "In 1996, over 60% of the prescriptions were  
22 written as 'substitution OK.'"

23 Do you see that?

24 A. Yes.

25 Q. What does that mean?

1           A. Well, it would refer to two things really.  
2       There are two ways in which a prescription could be  
3       written substitution okay. One was the one I mentioned  
4       earlier, which it is simply a generic prescription.  
5       KCl 8, 10, 20 mEqs, three times a day, and that's --  
6       that would be substitution okay obviously, because they  
7       would have no need for an A-B rated product.

8           The other way is if they just write K-Dur, for  
9       example, but they don't check DAW, then that means that  
10      it's open. They're not specifying that it has to be  
11      filled with that brand.

12          Q. And this reference, "over 60% of prescriptions  
13      were written with 'substitution OK,'" was that a  
14      reference to potassium?

15          A. Yes.

16          Q. And there it says, "This market is currently  
17      pharmacy driven. Managed care, purchasing groups and  
18      the pharmacists are making the majority of the  
19      potassium decisions."

20                 Do you see that?

21          A. Yes.

22          Q. What does that mean to you?

23          A. Well, what she is saying is that within this  
24      market -- and I believe that the share had grown in  
25      prescriptions at that time, maybe from 30 to 32

1     percent, something like that -- but what she's pointing  
2     out is that still, the pharmacy really has the ultimate  
3     decision on which product to dispense from her  
4     viewpoint. So, the pharmacist is really going to be  
5     important, because if he or she has the Klor Con 10 and  
6     they want to substitute that for a prescription that  
7     they get for the K-Dur 20, ultimately they're going to  
8     be able to do that.

9           Q. At this point in time, June of 1998, was there  
10    significant substitution back and forth between Klor  
11    Con 10 and K-Dur 20 tablets?

12           A. Yes.

13           Q. May I direct your attention now to tab 8, and  
14    if you would, please familiarize yourself with USX  
15    1551. It begins on Bates number USL 13791 and ends on  
16    13796. Just take a minute, if you would, sir.

17           A. (Document review.) Okay.

18           Q. What is USX 1551, Mr. Dritsas?

19           A. This is an update that Denise provided to her  
20    boss, Bob Coleman, regarding the 1998 business plan for  
21    Klor Con.

22           Q. And again, was Ms. Dolan working within your  
23    department at the time this was prepared?

24           A. Yes.

25           Q. In the highlighted section, "Beginning Q4 1997

1       --" is that a reference to the fourth quarter 1997?

2           A. Yes.

3           Q. "-- Klor Con sales were soft. The competition  
4       had increased dramatically in the potassium chloride  
5       market with major attacks from Apothecon."

6           Do you see that?

7           A. Yes.

8           Q. Was that your view of the potassium market in  
9       1997?

10          A. Yes.

11          Q. And what was Apothecon doing in 1997 to take  
12       market share?

13          A. They were pricing very competitively, and we  
14       lost some business to them.

15          Q. The next sentence says, "USL lost significant  
16       business in the independent market."

17               Is that a reference to the pharmacies?

18          A. Yes.

19          Q. "As well as in the chains due to aggressive  
20       pricing from Apothecon -- (for example, the loss of  
21       American Stores to Apothecon in 1997)."

22          A. Yes.

23          Q. What is American Stores?

24          A. American Drugstores is a chain, and we lost  
25       their account. We had been in there for years.

1 MR. GIDLEY: Your Honor, at this time we would  
2 offer USX 1551 for admission.

3 MS. BOKAT: No objection.

4 MS. SHORES: No objection, Your Honor.

5 JUDGE CHAPPELL: USX 1551 is admitted.

6 (USX Exhibit Number 1551 was admitted into  
7 evidence.)

8 BY MR. GIDLEY:

9 Q. Let me ask you to direct your attention, Mr.  
10 Dritsas, to page 795.

11 A. Yes.

12 Q. It says, "Activity Generated for High  
13 Prescribers of K-Dur 20."

14 Do you see that?

15 A. Yes.

16 Q. And that's the competitive product sold by  
17 Schering?

18 A. That's correct.

19 Q. And this is part of a marketing plan for Klor  
20 Con. Is that correct?

21 A. That's right, Klor Con 10 mEq wax matrix  
22 tablet.

23 Q. Under the first bullet, Activity, sub-bullet,  
24 Territory Sales, do you see that?

25 A. Yes.

1 Q. What does "territory sales" refer to in this  
2 document?

3 A. Those individuals who call on pharmacies and  
4 physicians from our home office in Minneapolis over the  
5 phone.

6 Q. That's your telephone sales force?

7 A. Right, by now we were calling them territory  
8 sales, so...

9 Q. I see. It says, "Purchased DDD."  
10 What's that a reference to?

11 A. That's the data that would tell us the  
12 pharmacies that dispense high volumes of products, in  
13 this case it's high volumes of K-Dur.

14 Q. And why were you targeting high volume K-Dur  
15 pharmacies at this time?

16 A. In order to take business away from them.

17 Q. The next bullet says, "National Accounts."  
18 What's that a reference to?

19 A. Those are the representatives who fly out and  
20 call on the headquarters for the chains, for the  
21 wholesalers, managed care.

22 Q. And the bullet says, "Targeted long term care  
23 (LTC) and select chains for switch programs."

24 A. Yes.

25 Q. And what is a switch program?



1           A. A therapeutic switch program. That would be  
2       where you would make some type of arrangement that --  
3       with them so that if they would switch over customers  
4       from the K-Dur to our product, there would be some  
5       market share or other things.

6           Q. The final bullet there says, "Chain Accounts  
7       are less inclined to target K-Dur 20, but a few have  
8       expressed interest in targeting microencapsulated  
9       products due to recent price increases."

10           Do you see that?

11           A. Yes.

12           Q. Was that your view of what price increases were  
13       doing to some of the chain accounts?

14           A. Yes, definitely. Around that time period, the  
15       microencapsulated products began to increase their  
16       price slightly, so chains were interested in -- we had  
17       an opportunity, in other words, to take business away  
18       from a microencapsulated product, even though we  
19       weren't A-B rated to the microencapsulated products.

20           Q. Then the next activity says, "Mailings:  
21       Initial mailing sent to top 12,000 prescribers of  
22       K-Dur."

23           Do you see that?

24           A. Yes.

25           Q. Now, prescribers there, is that a reference to

1 doctors?

2 A. That's physicians, yes.

3 Q. All right. So, that's a direct marketing  
4 campaign to doctors against K-Dur 20?

5 A. That's correct.

6 Q. And what product were you promoting?

7 A. K-Dur -- I'm sorry, Klor Con 10 wax matrix.

8 Q. Under Action Plan, bullet, "Purchase list of  
9 top 10,000 high prescribers of K-Dur 20."

10 Do you see that?

11 A. Yes.

12 Q. And again, that's a reference to doctors?

13 A. The doctors who are the high prescribers of  
14 K-Dur 20, yes.

15 Q. And why were you purchasing this data at this  
16 point in time?

17 A. We had a mail campaign, direct mail campaign,  
18 that we were going to send out to them talking about  
19 The Economical K, which is our branding position for  
20 Klor Con 10 mEq wax matrix, and we were going to do a  
21 series of mailings to these top prescribers and then  
22 call them.

23 Q. And why was it The Economical K? Why was Klor  
24 Con The Economical K?

25 A. Well, the idea behind it is that potassium is

1 potassium is potassium, and in the doctor's minds -- in  
2 the research we did, that's what we have consistently  
3 found in anything that we've done, is that they just  
4 think of potassium as not too terribly exciting, and  
5 it's just potassium, any of the potassium supplements  
6 will all do the same thing. So, we tried to  
7 distinguish ourselves as, yes, but when you think of us  
8 or you think of potassium, think of The Economical K,  
9 and then we had a branding.

10 Q. When did you start using the tag line "The  
11 Economical K"?

12 A. I believe we started using that in 1997.

13 Q. The next bullet says, "Cost savings by using 2  
14 Klor Con 10 Tablets instead of 1 K-Dur 20," do you see  
15 that?

16 A. Let me find it, I'm sorry.

17 Q. It's under the bullet, "Develop --"

18 A. Cost savings, yes.

19 Q. The bullet about the six direct mail pieces.

20 A. Yes.

21 Q. And was this a message that was sent to  
22 physicians in 1998?

23 A. Yes.

24 Q. And it was encouraging them to drop K-Dur. Is  
25 that correct?

1           A. Well, it was to physicians, so they wouldn't be  
2 dropping it necessarily. They would be writing  
3 prescriptions for our product.

4           Q. But at the point of prescription, to substitute  
5 Klor Con instead of K-Dur.

6           A. Yes.

7           Q. Let me direct your attention to tab 9, USX 480.

8                   If I may, Your Honor, I know at some point we  
9 will have a lunch break, but if I can finish this  
10 binder. We're pretty much done with the binder, but I  
11 think we can get it finished up in five or ten minutes.

12           JUDGE CHAPPELL: Let's press on until sometime  
13 after 1:00.

14           MR. GIDLEY: All right.

15           BY MR. GIDLEY:

16           Q. Tab 9, Mr. Dritsas --

17           A. Yes.

18           Q. -- is USX 480.

19           A. Yes.

20           Q. And could you identify this document for the  
21 record, please?

22           A. This is a letter that was sent to those high  
23 prescribers that were identified earlier as a way of a  
24 mailing, high prescribers of K-Dur 20.

25           Q. And it says, "Prescribe Klor Con Tablets for

1 the treatment and prevention of hypokalemia. If you  
2 are writing prescriptions for 20 mEq or potassium per  
3 day, Klor Con 10 Tablets cost only 36 cents per day.  
4 This represents a 5% savings verses the leading brand  
5 of 20 mEq potassium tablets."

6 Do you see that?

7 A. Yes.

8 Q. And that leading brand of 20 mEq potassium  
9 tablets, what brand would that be, sir?

10 A. That's K-Dur 20.

11 Q. And this is a letter, a form letter that went  
12 out to doctors?

13 A. Yes.

14 Q. And who -- over whose signature did this letter  
15 go out?

16 A. That's my signature. It would be under my  
17 signature.

18 Q. And again, the boxed information that compares  
19 two wholesale -- average wholesale prices, that's  
20 comparing K-Dur 20 to what product?

21 A. To our Klor Con 10.

22 Q. And you were making a direct price comparison  
23 between the Klor Con 10 and the K-Dur 20, sir?

24 A. Yes.

25 Q. Let me direct your attention to the next page

1 of this exhibit. Is this another -- what is this page?

2 A. This is -- let me look for a moment, please.

3 Q. Sure.

4 A. (Document review.) This is another letter that  
5 went out. It was a series of letters that went to high  
6 prescribers of K-Dur.

7 Q. And did this --

8 A. This is yet another one.

9 Q. I'm sorry.

10 Did this letter actually go out to doctors?

11 A. Yes.

12 Q. And it says, "Doctor, we encourage you to  
13 consider the price savings your patients will realize  
14 if you provide them with the possibility of taking The  
15 Economical K, Klor Con," and skipping, it says, "For  
16 example, note the following price comparison between  
17 Klor Con 10 mEq tablets versus K-Dur 20 mEq tablets."

18 Do you see that?

19 A. Yes.

20 Q. And again, what's the marketing message here to  
21 doctors?

22 A. The marketing message here is that we're The  
23 Economical K. There's a message in here earlier  
24 regarding the long-range cost of their potassium  
25 therapy. Again, these patients are potentially going

1 to be on this for the rest of their lives, so we're  
2 asking them to think about the long-range costs that  
3 are going to be associated with this potassium, and why  
4 not prescribe The Economical K?

5 Q. And you're making a direct comparison between  
6 the Klor Con 10 mEq and the K-Dur 20 mEq. Is that  
7 correct?

8 A. That's correct.

9 Q. And about what time did this letter go out,  
10 sir?

11 A. It went out during that same time period.  
12 Actually, I -- I can't see from the bottom on my copy.

13 Q. Okay, but there's a date code at the bottom.  
14 It just may not be legible.

15 A. Right.

16 Q. Okay. It says here, "Price is not the only  
17 reason to prescribe Klor Con 10 tablets."

18 Are you with me?

19 A. Yes.

20 Q. "All Klor Con products undergo the same  
21 rigorous testing as other branded potassium products."

22 Do you see that?

23 A. Yes.

24 Q. So, was price your only message or did you have  
25 other messages to doctors?

1           A. No, it was -- it was a branded message that we  
2           had been very successful in doing, you know, prescribe  
3           it as a brand, get the benefits of a generic. So, you  
4           know, quality of product, we'll provide the education,  
5           we can provide samples, we can support it to you in the  
6           way that major companies do or the branded -- other  
7           branded products could do, but your patients will get  
8           an economical generically priced product.

9           Q. Let me direct your attention now to tab 10, USX  
10          380.

11          A. Yes.

12          Q. This is a document that looks like an e-mail.  
13          Is that correct?

14          A. It was.

15          Q. And who is John G. Adams at the top of the  
16          page?

17          A. By 1999 when this document was -- or e-mail was  
18          sent to me, John Adams had now had the responsibilities  
19          for the Klor Con line.

20          Q. And did he take over from someone else?

21          A. From Denise. Denise is still in our -- Denise  
22          went part-time, and she works in a different part of  
23          marketing now.

24          Q. I see. And the subject of this e-mail is  
25          Apothecon Pricing. Is that correct?



1 A. Yes.

2 Q. And at this time, Mr. Adams was in charge of  
3 the -- some of the marketing information for Klor Con.  
4 Is that correct?

5 A. Yes.

6 Q. And what's he reporting here to you about  
7 Apothecon?

8 A. Well, he's giving me the update on Apothecon,  
9 because I continued to be concerned about their fierce  
10 competitive pricing, and then I wanted to get a handle  
11 on to what extent their aggressive pricing strategies  
12 were hurting our products.

13 Q. And were they hurting your sales at this time?

14 A. They were.

15 MR. GIDLEY: Your Honor, we would move for the  
16 admission of USX 380 at this time.

17 MS. BOKAT: No objection.

18 MS. SHORES: No objection.

19 JUDGE CHAPPELL: USX 380 is admitted.

20 (USX Exhibit Number 380 was admitted into  
21 evidence.)

22 BY MR. GIDLEY:

23 Q. May I direct your attention to tab 11, USX 484,  
24 Mr. Dritsas.

25 A. Yes.

1 Q. And what is 484?

2 A. If I could just take a moment. (Document  
3 review.) This is an update that's provided by the  
4 product managers. In this case this update is  
5 pertaining to the Klor Con 8 and 10 franchise.

6 Q. And was this a document prepared in your sales  
7 and marketing department?

8 A. Yes.

9 Q. Directing your attention to the highlighted  
10 language on page 3328, "A tactic was implemented in  
11 1999 to high prescribers of K-Dur. This tactic is  
12 designed to have physicians prescribe two 10 mEq  
13 tablets versus one 20 mEq resulting in a 56% price  
14 savings."

15 Do you see that?

16 A. Yes.

17 Q. And sir, did that campaign actually take place  
18 in 1999?

19 A. Yes, it did. The letters that we referred to  
20 were part of that campaign.

21 Q. Let me direct your attention now to page 330.

22 A. Yes.

23 Q. And this document, sir, by the way, speaks as  
24 of October '99. Is that correct?

25 A. Yes.

1           Q. And now directing your attention to page 330,  
2       bullet, "Select chains and mail order accounts are  
3       being targeted to implement a tactic designed to offer  
4       Klor Con 10 Tablets as a therapeutic alternative to the  
5       more expensive and less profitable microencapsulated  
6       products."

7           Do you see that?

8           A. Yes.

9           Q. And what products did you have in mind at that  
10      time for targeting the Klor Con 10 against?

11          A. Micro-K 10 and the Ethex product.

12          Q. And in the bullet it says, "Beginning in  
13      August, a direct mail campaign was initiated that was  
14      targeted to high prescribers of K-Dur. This tactic is  
15      designed to have physicians prescribe 2 Klor Con 10  
16      Tablets versus 1 K-Dur 20 based on the quality of Klor  
17      Con as well as the 56% savings."

18          Do you see that?

19          A. Yes.

20          Q. And were those mailings sent?

21          A. Yes, they were.

22          Q. And how many doctors got the mailings?

23          A. Well, as you can see here, we talk about the  
24      first two had already gone out to 10,200, there would  
25      be a total of six waves planned, so that's two of the

1 six. We generated over 280 leads for physicians, and  
2 those are the ones that we would call and follow up on.

3 Q. Did you consider that campaign successful?

4 A. Very successful, yes.

5 Q. And there's reference made here to further  
6 waves, three, four, five and six. Do you see that?

7 A. Yes.

8 Q. Did those mailings occur?

9 A. Well, through this time period in October, we  
10 had sent through the first three mailings, and then  
11 it's referenced that we plan on sending four in  
12 November and then five and six later in November and  
13 then December.

14 Q. And turning your attention to the next page,  
15 the highlighted language on page 331 says, "The fourth  
16 and fifth wave of a new direct mail campaign designed  
17 to have physicians prescribe 2 10 mEq tablets instead  
18 of 1 20 mEq tablet were sent in November to high  
19 prescribers of K-Dur. BRC's are included in the fifth  
20 and sixth waves."

21 Do you see that?

22 A. Yes.

23 Q. Did that campaign actually take place?

24 A. Yes. This is a page that's separate from the  
25 earlier document. This page would have been generated

1 in December as part of our operational committee notes  
2 to talk about some highlights that happened in  
3 November. So, this shows that the wave of the mailings  
4 did, in fact, go out, that there was a BRC, which is a  
5 business reply card, so that physicians could then fill  
6 out their name and address and say, yes, I'm  
7 interested, please send me more information or have a  
8 representative call me.

9 Q. And again, that's a campaign designed to drive  
10 sales of Klor Con 8 and 10 against K-Dur 20?

11 A. That's correct.

12 Q. Let me direct your attention to tab 12, sir,  
13 USX 425.

14 A. Yes, if I can just take a moment.

15 Q. Sure.

16 A. Thank you. USX 425?

17 Q. And sir, just -- what for the record is USX  
18 425? It bears a date at the bottom 12/23/1999.

19 A. Let me just take a look, please. (Document  
20 review.) It's -- this is part of -- this is actually  
21 an addendum to something that would have been done for  
22 Klor Con earlier, and I can't say that this was all  
23 from the same document.

24 Q. All right. Which pages appear to be part of  
25 the addendum?

1           A. Definitely the first two pages are part of --  
2   the first three pages are part of the addendum.

3           Q. All right, my questions are on pages 1 and 2.

4           A. Okay.

5           Q. Directing your attention to page -- the Bates  
6   number is very fine, but it's the first page of USX  
7   425. It says, "Private Label Potassium chloride  
8   Addendum" at the top. Do you see that?

9           A. Yes.

10          Q. "Bulk has enabled Upsher-Smith to gain business  
11   through government, as well as mail order  
12   opportunities."

13                 Do you see that?

14          A. Yes.

15          Q. What is "bulk" a reference to?

16          A. That's the 5000 and 10,000 bulk presentation of  
17   Klor Con 10 mEq.

18          Q. All right. And the next sentence says, "This  
19   has become increasingly important with the advent of  
20   generic competition. Players like Apothecon and Abbott  
21   have gained share at the expense of our brand as well  
22   as private label products."

23                 Do you see that?

24          A. Yes.

25          Q. Is that your recollection of what Apothecon and

1 Abbott were doing in this time period?

2 A. Yes.

3 Q. And how were they competing?

4 A. Largely on price.

5 Q. Down below, "Rational/Issues: Apothecon is  
6 gaining market share in the 10 mEq potassium chloride  
7 market through aggressive pricing. Apothecon grew 487  
8 percent in units from '96 to '97."

9 Do you see that?

10 A. Yes.

11 Q. Is that 487 percent a typo?

12 A. No.

13 Q. That was their growth?

14 A. Yes.

15 Q. Between '96 and '97?

16 A. Yes.

17 Q. In potassium chloride?

18 A. Yes.

19 Q. And they had a 10 mEq product that was doing  
20 that?

21 A. Yes.

22 Q. And it says in the next bullet, "Apothecon has  
23 secured chain and wholesale generic source business  
24 with lower pricing."

25 Do you see that?

For The Record, Inc.  
Waldorf, Maryland  
(301) 870-8025

1 A. Yes.

2 Q. Was the Apothecon product therapeutically  
3 equivalent with your product?

4 A. Well, it's not A-B rated to our product if  
5 that's your question.

6 Q. Does it deliver potassium in --

7 A. It does. It's a therapeutic equivalent. It's  
8 not an A-B rated product, yes.

9 Q. The final bullet says, "In order maintain  
10 private label accounts and compete for new business in  
11 the generic/source arena, we must entertain a lower  
12 pricing strategy for all 10 mEq private label accounts  
13 (with the exception of Altana)."

14 Do you see that?

15 A. Yes.

16 Q. And what is that a reference to?

17 A. What it's saying is we must entertain a lower  
18 pricing strategy. Some of the accounts for whom we  
19 provide private label had pressured us to consider  
20 lowering our costs to them.

21 Q. And did you?

22 A. As a result of some of the competitive  
23 pressures that they were facing, we lowered our costs  
24 to them. Of course, they price it wherever they want,  
25 but yes, we did.

For The Record, Inc.  
Waldorf, Maryland  
(301) 870-8025



1           Q. And those firms were competing in potassium  
2 chloride as well, were they not?

3           A. Yes.

4           Q. Now, directing your attention to the top of  
5 page -- the next page, which says at the top  
6 Tactics/Scenarios, it says first, "Leveraging Tactics:  
7 Klor Con: Target key brands such as K-Dur 10 and 20  
8 with our Klor Con brand message to pursue market  
9 segment with higher ASP."

10           Do you see that?

11           A. Yes.

12           Q. And sir, what products were you using to target  
13 10 and 20 at this time?

14           A. The 10 mEq wax matrix.

15           Q. And that reference that's highlighted, "Lower  
16 the acquisition price to all 10 mEq private label  
17 accounts," is that the same phenomenon you just  
18 described?

19           A. That's just what I was describing, yes.

20           Q. All right. Directing your attention to tab 13,  
21 USX 410.

22           A. Yes.

23           Q. Would you take a minute to familiarize yourself  
24 with USX 410, and I would point out there are a few  
25 pages at the back that you may want to focus on. They

1 may not be part of this exhibit, but -- they are, for  
2 the record, part of the exhibit, but just take a look.

3 A. Okay, just give me a moment, please. (Document  
4 review.) Okay.

5 Q. Just to assist you, Mr. Dritsas, it appears to  
6 me that pages 190259 to 350 appear to be together, and  
7 the last several pages starting on 351 appear to me to  
8 be extraneous, but why don't you identify, if you can,  
9 what these pages are.

10 A. Oh, this is -- this document is complete  
11 through 190350.

12 Q. All right, and my questions won't go beyond  
13 350.

14 A. Okay.

15 Q. Can you identify what this document is between  
16 190259 and 350, sir?

17 A. It's a training manual.

18 Q. And can you -- is this your training manual at  
19 Upsher-Smith?

20 A. Yes. I'm sorry, this is the Upsher-Smith  
21 Training Manual. This was probably from around the  
22 year 2000.

23 Q. And for what product line is this a training  
24 manual?

25 A. And this is the Klor Con training.

1 Q. And how was this used within Upsher-Smith?

2 A. It's used to train all of our new  
3 representatives who come in. It isn't rebuilt, by the  
4 way, every year. Some of this material might be older  
5 than 2000. If it's still pertinent, we just carry it  
6 forward, but I believe 2000 is probably the most recent  
7 update we had in here.

8 Q. All right.

9 I would now move, Your Honor, for the admission  
10 of USX 410.

11 MS. BOKAT: No objection.

12 MS. SHORES: No objection, Your Honor.

13 JUDGE CHAPPELL: USX 410 is admitted.

14 (USX Exhibit Number 410 was admitted into  
15 evidence.)

16 BY MR. GIDLEY:

17 Q. Let me start on page 261, Mr. Dritsas,  
18 Technical Training Objectives.

19 A. Yes.

20 Q. And by the way, who would get this training?  
21 Who would have received this manual?

22 A. Everyone who was in the sales and marketing  
23 area would receive this training, every new person that  
24 we hired, for example, who would be in our territory  
25 sales group. Today, because we do have a field force,

1 every field representative would also receive this.

2 It's standard. And they would have to pass a test, as  
3 a matter of fact, in order to be allowed to go out and  
4 promote our products.

5 Q. Now, as part of your training in the first part  
6 of 2000, it says under the final category on this page  
7 for Objectives, Competitive Products, "Compare and  
8 contrast Klor Con products to competitive products,  
9 including K-Dur and Micro-K."

10 Do you see that?

11 A. Yes.

12 Q. And was that your view, sir, of K-Dur and Klor  
13 Con, they were competing products at this time?

14 A. Yes, absolutely. They were all part of the KCl  
15 market.

16 Q. Let's flip down to page 266.

17 A. 266, okay.

18 Q. There are a variety of training objectives  
19 listed here. I'm interested in the sixth one. It  
20 says, "Use product knowledge and selling skills to  
21 target therapeutic substitution opportunities with Klor  
22 Con, i.e., Micro-K and K-Dur 20 mEq."

23 Do you see that?

24 A. Yes.

25 Q. And was this, again, to train -- what's going

1 on here?

2 A. The objectives for the sales representatives  
3 when calling on physicians or pharmacists is to get  
4 them to make a therapeutic substitution for our Klor  
5 Con 10 in place of in this case Micro-K or K-Dur 20  
6 mEq.

7 Q. And the Klor Con products here would be --  
8 would include Klor Con 10 wax matrix?

9 A. It -- yes, the emphasis would be in this case  
10 on the Klor Con 10 wax matrix.

11 Q. Let me direct your attention to the next  
12 portion of this training manual at Upsher-Smith for  
13 Klor Con. The next page, 267, says, "Considerations  
14 for Selection of Potassium Supplements."

15 A. Yes.

16 Q. And it looks to be a brochure, and going two  
17 further pages down to 269 --

18 A. Yes.

19 Q. -- it says, "Clinical Studies."

20 Do you recall this brochure?

21 A. Yes.

22 Q. And it says in the third bullet under the  
23 summary of this clinical studies, it says, "The low  
24 incidence of adverse effects and low dropout rate  
25 suggest that Klor Con tablets were well tolerated and

1 well accepted by the patients in the study."

2 Do you see that?

3 A. Yes.

4 Q. And sir, is that something that you would be  
5 able to use in your marketing of Klor Con?

6 A. Yes, this was -- these were the actual clinical  
7 studies that were done in order to gain approval for  
8 Klor Con, and so we can reference -- we have  
9 ulcerogenicity studies, we have pre-endoscopic studies,  
10 and that was all part of what was done in order to  
11 prove with the FDA that it is, in fact, well tolerated,  
12 safe and effective -- not effective, well tolerated and  
13 safe. So, this is referencing the clinical studies  
14 that we did in order to do that.

15 Q. And when you say well accepted, you mean well  
16 accepted by the patients?

17 A. Exactly.

18 Q. The next page is an endoscopic study.

19 A. Yes.

20 Q. And what was the conclusion of this study?

21 A. Well, the conclusion is that the damage was not  
22 greater after administration of either potassium  
23 chloride extended-release tablet than after  
24 administration of a placebo. So, in this case, they  
25 looked at the 10 mEq of ours and then they looked at

1 the Slow K and they looked at the placebo and said  
2 there's no damage from this.

3 Q. And within the confines of this study, there  
4 wasn't any damage worse than the placebo.

5 A. Right.

6 Q. Directing your attention to page 275.

7 A. Yes.

8 Q. There appears an Executive Summary.

9 A. Yes.

10 Q. It says, "Both wax-matrix tablets and  
11 microencapsulated, extended-release potassium products  
12 are comparable in terms of efficacy and safety,  
13 although the tablets may be smaller and easier to  
14 swallow than the microencapsulated products."

15 Do you see that?

16 A. Yes.

17 Q. And again, is that something you believed at  
18 this time?

19 A. Yes.

20 Q. And was this a marketing message that you used  
21 to market Klor Con against K-Dur 20?

22 A. Yes, it is, and as a matter of fact, this  
23 particular piece was used in order to support some of  
24 the formulary decisions that we talked about earlier  
25 with managed care, so that they could make a decision

1 to have a preference for Klor Con. So, this was part  
2 of the information that backed their decision to have a  
3 therapeutic substitution made.

4 Q. Let me direct your attention further down in  
5 the training manual, and again, we're in USX 410 at  
6 page 291.

7 A. Okay.

8 Q. And there's discussion of liquid, powders, and  
9 a concluding paragraph, "It is important to note that  
10 liquids, effervescent tablets and sustained-release  
11 tablets are all equally effective in replacing  
12 potassium and minimizing side effects. Patient  
13 preference and setting is generally the deciding factor  
14 for which product is used. For example, a nursing home  
15 resident who cannot swallow tablets may require a  
16 liquid preparation, while many patients leading an  
17 active life may prefer the convenience of a tablet."

18 Do you see that?

19 A. Yes.

20 Q. And sir, did you believe that at the time this  
21 manual was prepared?

22 A. Yes, we believed it, and I think if you looked  
23 at the share of total prescriptions, you could see that  
24 they were spread across all the various forms. So, I  
25 think that would substantiate that.



1 Q. Now, directing your attention to the next page,  
2 there's a listing of available potassium products. Do  
3 you see that?

4 A. Yes.

5 Q. And there are a variety of products listed  
6 there, correct?

7 A. Yes.

8 Q. And they're not all potassium chloride, are  
9 they?

10 A. No.

11 Q. What are some of the other forms of potassium  
12 that appear on that table?

13 A. Potassium gluconate, potassium chloride  
14 bicarbonate. Those are the -- potassium acetate.

15 Q. And in your view at this time, did all of these  
16 products compete for the sale of potassium in the U.S.  
17 at this time?

18 A. Yes.

19 Q. And included in the chart is K-Dur 10 and 20,  
20 is it not?

21 A. I just need to find it, I'm sorry. Yes, sorry.

22 Q. And in the box above K-Dur 10 appears what  
23 products?

24 A. Klor Con 10, K-Tab, K-Plus 10, Klotrix,  
25 various.

1 Q. All competitive products?

2 A. Yes.

3 Q. Let me direct your attention now to page 305.

4 Are you there?

5 A. Yep.

6 Q. It's a market summary.

7 A. Yes.

8 Q. Would this come -- would this have come out of  
9 your department, this summary?

10 A. Yes.

11 Q. And the second paragraph reads, "The potassium  
12 market has remained relatively stable despite generic  
13 competition; however, market pressures includes:  
14 Price; increased emphasis on the 20 mEq; increased  
15 price erosion in the 8 and 10 mEq arenas; generic  
16 competition from branded companies; consolidation and  
17 increased promotion in the microencapsulated arena."

18 Do you see that?

19 A. Yes.

20 Q. Did you agree that all five of those pressures  
21 were coming to bear on the potassium market?

22 A. Yes.

23 Q. And this business about increased emphasis on  
24 the 20 mEq, why would that be relevant in the first  
25 quarter of 2000 to people being trained to sell Klor

1 Con 10?

2 A. Because it would tell them where to target  
3 their efforts, to go after the 20 mEq prescribers or  
4 the pharmacists who are dispensing high volumes of the  
5 20 mEq tablet of K-Dur.

6 Q. And the first market pressure listed here is  
7 price. Is that correct?

8 A. That's right.

9 Q. Would you agree with that?

10 A. Yes.

11 Q. Let me direct your attention to page 308, and  
12 we're just about at a breaking point.

13 Mr. Dritsas, this is a page that says "Position  
14 Strategy," and again, it's from the Klor Con training  
15 manual.

16 A. Yes.

17 Q. Do you see the final paragraph there, "USL will  
18 continue to target high prescribers of K-Dur with Klor  
19 Con Tablet mailings"?

20 Do you see that?

21 A. Yes.

22 Q. "These mailings are designed to build awareness  
23 and generate leads for Klor Con, The Economical K. The  
24 message will focus on the cost savings for patients  
25 (56%) that can be realized by prescribing two 10 mEq

1       tablets instead of one 20 mEq tablet without  
2       sacrificing quality."

3               Do you see that?

4           A.   Yes.

5           Q.   And was that something that you wanted trainees  
6       to know at this time in your company?

7           A.   Absolutely, that was the whole selling  
8       strategy. That was our positioning and our message to  
9       the physicians.

10          Q.   It says, "A sell sheet specifically targeted at  
11       physicians is designed to reinforce the cost savings  
12       message versus K-Dur 20 and the quality of Klor Con 10  
13       Tablets."

14               Do you see that?

15          A.   Yes.

16          Q.   And again, sir, was it important to tell  
17       trainees that you were gunning for K-Dur 20 at this  
18       time?

19          A.   Absolutely.

20          Q.   Finally, it says, "Additional expenditures will  
21       be reviewed for programs that can effectively encourage  
22       pharmacists at mail service or chain pharmacies to  
23       intervene on the patients' behalf to encourage a switch  
24       from K-Dur 20 to Klor Con 10."

25               Do you see that?

For The Record, Inc.  
Waldorf, Maryland  
(301) 870-8025

1 A. Yes.

2 Q. And is that a therapeutic interchange?

3 A. That is a therapeutic interchange.

4 Q. And that would be a phone call from the  
5 pharmacist to the doctor, for instance?

6 A. Yes, it would.

7 Q. And directing your attention to the next page,  
8 we see a document that we saw earlier, and it's dated  
9 January 1, 2000.

10 A. Yes.

11 Q. It's the box. And again, this is a box that  
12 would have been prepared by the marketing department?

13 A. Yes.

14 Q. And these are all products that you competed  
15 with at this time?

16 A. That's correct.

17 Q. So, Klor Con 10 in the first box competed with  
18 K-Dur 20 down at the lower box?

19 A. Yes.

20 Q. All right. Moreover, directing your attention  
21 to page 312, KCl Manufactures and Distributors, "The  
22 following is a list of all competitors and distributors  
23 that sell 8 and 10 mEq potassium chloride products."

24 Do you see that?

25 A. Yes.

1           Q. Could you take a minute and count those  
2 producers, and don't -- try not to double-count, if you  
3 can, sir.

4           A. (Document review.) I counted 27 of the --

5           Q. Twenty-seven manufacturers and distributors  
6 selling potassium chloride at this time?

7           A. Yes.

8           Q. And you were competing with all of them, sir?

9           A. Yes.

10          Q. Let me direct your attention to a series of  
11 pages, it's the next section of this document. Let me  
12 start off with the front end of this section, page 320.

13          A. Yes.

14          Q. Klor Con Pharmacy Issues and Objections, and  
15 could you familiarize yourself with the next three or  
16 four pages very quickly?

17          A. Yes.

18          Q. How did this -- what's going on in these pages  
19 from the standpoint of training your sales and  
20 marketing force?

21          A. Well, we provide them with mock situations, if  
22 you will, so that when they go into training, they can  
23 role-play, and these are the type of situations that we  
24 put them in. So, in other words, you have the first  
25 situation where a customer might say to you, I stocked

1 Klor Con in the past, but now I'm getting it less for  
2 some other.

3 And then the trainers are providing probes to  
4 begin with on what the representatives can do, and then  
5 a number of selling statements to support that.

6 It's -- we provide a need satisfaction selling model  
7 for training for our entire department, and this is the  
8 model that we go through.

9 Q. Directing your attention to page 323.

10 A. Yes.

11 Q. There's a little heading that reads, "Most of  
12 our potassium movement is in the K-Dur 20 mEq."

13 Do you see that?

14 A. Yes.

15 Q. And in this role-playing script, what's that --  
16 who's saying that?

17 A. So, in this case, the pharmacist says to you as  
18 the representative, most of our potassium movement is  
19 in the K-Dur 20, and so the -- your response then as  
20 the rep is to probe, ask them -- there's a number of  
21 questions that you can ask. For example, how often is  
22 cost an issue for your K-Dur customers? Then it  
23 provides a selling statement. So, you can turn around  
24 then in this situation and say, you know, I have many  
25 pharmacists who use Klor Con 10 mEq for those customers

1     who complain about the costs of K-Dur 20. With just a  
2     quick call to the doctor, you can offer these customers  
3     a name brand product that offers a substantial savings  
4     compared to the K-Dur 20 mEq.

5           Q. And just listening to the responses on the  
6     probes, would this permit your sales force to learn  
7     what the patients were actually doing?

8           A. Yes.

9           Q. And directing your attention to the selling  
10    statements, the second bullet there, is that a -- kind  
11    of a scripted answer? What's going on there?

12          A. The one I just read?

13          Q. The one that begins, "I do have many  
14    pharmacists who use Klor Con 10 mEq for those  
15    customers --"

16          A. Yes, that's a selling statement.

17          Q. So, the person at Upsher-Smith would say, "I do  
18    have many pharmacists who use Klor Con 10 mEq for those  
19    customers who complain about the costs of K-Dur 20  
20    mEq"?

21          A. That's correct.

22          Q. And was that, in fact, true?

23          A. Yes.

24          Q. That wasn't just a selling statement; that was  
25    true?



1           A. We wouldn't make a selling statement if it  
2 weren't based on the facts.

3           Q. The second sentence says, "With just a quick  
4 call to the doctor, you can offer these customers a  
5 name brand product that offers a substantial savings  
6 compared to the K-Dur 20 mEq."

7           Do you see that?

8           A. Yes.

9           Q. And again, was that a script that you were  
10 training people to use at Upsher-Smith?

11          A. That's right.

12          Q. And did people have conversations like this at  
13 your company?

14          A. This is how we were accomplishing it, yes.  
15 They didn't have to read it from the script. This is  
16 just from a training standpoint, because we don't have  
17 our people actually reading scripts, but when they  
18 engage in conversation, this provides them with a basis  
19 for making the transition from K-Dur over to Klor Con  
20 10 for that therapeutic substitution.

21          Q. All right. Here's my last -- I'm sorry, here's  
22 my last page.

23          A. Yes.

24          Q. Page 347.

25          A. Okay.

1           Q. And what is page 347 out of the training  
2 manual?

3           A. I love this page. This is an ad I happened to  
4 come up with, but it's something that we did to the  
5 physicians. This was one of our first ads. You can  
6 see on there we're talking about combining the value  
7 with quality to cut the therapy costs in half.  
8 Consider the possibilities. Proven effective in  
9 maintaining serum potassium levels, well tolerated,  
10 well accepted by patients, may significantly reduce  
11 co-pays for managed care plans.

12                 And this is playing off that strategy that we  
13 talked about earlier where your co-pay might actually  
14 be less for the Klor Con product than it would be for  
15 the K-Dur, reminding physicians of that.

16           Q. Mr. Dritsas, how can you date this document?

17           A. You can date it on the bottom here, on the  
18 right, under Upsher-Smith, you know, where it says  
19 1-800, if you see the KT 146 AMD, that refers to the  
20 mailing to the doctors, now we know it's a doctors  
21 mailing.

22           Q. Right.

23           A. 09, which would have been September, of 1999,  
24 and it looks like 25,000 of those went out.

25           Q. And what's on this prescription pad?

1           A. The prescription pad says, "Klor Con 2 X 10  
2 mEq," and then the doctor's signature.

3           Q. And what are you competing against in this  
4 advertisement?

5           A. We are competing directly against K-Dur 20 mEq  
6 tablet.

7           Q. And it says in the bullet, "Patients may save  
8 up to 56% per prescription by taking two Klor Con 10  
9 mEq tablets instead of one K-Dur 20 tablet."

10           Did I get that right?

11           A. Yes.

12           Q. The prior bullet talks about co-pays.

13           A. Yes.

14           Q. What's the significance of the prior bullet?

15           A. Well, if we're on a formulary where the Klor  
16 Con has a preferred status, for example, there are  
17 generally speaking tiered co-payments that managed care  
18 uses in order to persuade consumers and doctors to use  
19 the alternatives they've chosen. So, in this case --  
20 this was actually taken by a Scott Levin Survey, an  
21 outside party that did a survey of managed care  
22 co-payments, where it compared the co-payment for Klor  
23 Con in these plans, which would be \$6.19, compared to  
24 anywhere from \$12 up to \$26 for the K-Dur.

25           Q. And would that be an example of the preferred

1       formulary status that you were talking about earlier?

2           A.   Yes.

3           Q.   All right.

4           Your Honor, we're at a natural breaking point.

5           JUDGE CHAPPELL:   Okay, let's adjourn for lunch  
6   until 2:20.

7           (Whereupon, at 1:25 p.m., a lunch recess was  
8   taken.)

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 AFTERNOON SESSION

2 (2:20 p.m.)

3 JUDGE CHAPPELL: Mr. Nields?

4 MR. NIELDS: Your Honor, I will try to speak  
5 more distinctly this time, housekeeping.

6 JUDGE CHAPPELL: Okay.

7 MR. NIELDS: I have had a chance to confer with  
8 Mr. Eisenstat, and we are both comfortable with the  
9 demonstrative exhibits that were used yesterday with  
10 Mr. Lauda as being received for identification and  
11 being used in a normal manner that the Court would use  
12 demonstratives.

13 JUDGE CHAPPELL: Do you have the exhibit  
14 numbers?

15 MR. NIELDS: Yes, they are 2264, 2266 and 2267.

16 JUDGE CHAPPELL: Okay, and you are offering  
17 those three exhibits, and no objection, Mr. Eisenstat?

18 MR. EISENSTAT: That's correct, Your Honor.

19 JUDGE CHAPPELL: They are being admitted for  
20 identification. They were demonstrative exhibits used  
21 by an expert.

22 Are those CX numbers or-

23 MR. NIELDS: I'm sorry, SPX, each one of them  
24 is an SPX number.

25 JUDGE CHAPPELL: So, SPX 2264, SPX 2266, SPX

1 2267 are admitted. So, Mr. Eisenstat trusts you, but  
2 he's verifying. Is that why he's here?

3 MR. NIELDS: Actually, it was luck that he came  
4 in. He came for other reasons, and we had a brief  
5 collaboration.

6 (SPX Exhibit Numbers 2264, 2266 and 2267 were  
7 admitted into evidence.)

8 JUDGE CHAPPELL: Okay, anything else?

9 MR. NIELDS: Nothing else for me, Your Honor.

10 JUDGE CHAPPELL: Thank you.

11 MS. BOKAT: Your Honor, may I raise one  
12 scheduling matter, please?

13 JUDGE CHAPPELL: As opposed to later? I'd  
14 rather hear it now, sure.

15 MS. BOKAT: Thank you. Our answer -- complaint  
16 counsel's answer to Upsher's motion to dismiss is due  
17 tomorrow. One of the people working on it has had a  
18 death in the family and has to be at a funeral  
19 tomorrow, so we were wondering if we could have until  
20 Monday to file that answer.

21 I conferred with Mr. Curran, and he says while  
22 he does care about the timing on his motion, he would  
23 not oppose complaint counsel's request.

24 JUDGE CHAPPELL: Okay, with that understanding,  
25 that will be fine. So, it will be due Monday.

1 MS. BOKAT: Thank you, Your Honor.

2 JUDGE CHAPPELL: Sure.

3 Mr. Gidley, I think we're ready for you now.

4 MR. GIDLEY: Thank you, Your Honor.

5 JUDGE CHAPPELL: I note that the drugs are  
6 still up on the Bench here.

7 MR. GIDLEY: We are going to have to entrust  
8 them to the custody of White & Case very soon, Your  
9 Honor.

10 BY MR. GIDLEY:

11 Q. Mr. Dritsas, good afternoon.

12 A. Good afternoon.

13 Q. May I direct you to the second binder of  
14 Dritsas exhibits.

15 A. Yes.

16 Q. And may I direct your attention, sir, to tab  
17 14.

18 A. Yes.

19 Q. And sir, what is tab 14? What is USX 1005?

20 A. This is the -- one of our mailings that we did.  
21 This is an advertisement to physicians. We sent this  
22 out to the high prescribers of K-Dur.

23 Q. May I direct your attention to tab 15.

24 A. Yes.

25 Q. USX 1006, and there appears a color copy and a

1 black and white copy. Can you quickly review this  
2 exhibit?

3 A. Yes.

4 Q. And what is that, sir?

5 A. This is another -- in the six-part mailing we  
6 had, in this case we actually offered a little paper  
7 cutter to physicians who sent information back. It's  
8 all on the same thing, combining value and quality to  
9 cut the therapy costs in half for your patients. This  
10 was targeted towards high prescribers of K-Dur, and  
11 specifically the letter that accompanied this talked  
12 about switching your patients from K-Dur to Klor Con.

13 Q. Directing your attention to the second page  
14 with the coins, it says, "Introduce your patients to  
15 Klor Con 10 Tablets."

16 A. Yes.

17 Q. Do you see that page?

18 A. Yes.

19 Q. And there are four products listed there. Can  
20 you tell me what message you're trying to get across to  
21 the doctors?

22 A. Well, in this case, again, we're talking about  
23 The Economical K, which is our product, and we're  
24 comparing K-Dur 10, K-Dur 20, and then also the Micro-K  
25 product in the 10 mEq, and none of these products are



1 A-B rated to one another. What we're showing here is  
2 the cost savings offered by Klor Con 10.

3 Q. And directing your attention to the dosage, the  
4 footnote says, "Based on average daily dose of 20 mEq."

5 Do you see that?

6 A. Yes.

7 Q. Does that mean that the dosage of potassium  
8 between each of these four alternatives is identical?

9 A. Yes.

10 Q. In other words, that would be two Klor Con 10s  
11 against one K-Dur 20?

12 A. That's correct.

13 Q. And similarly, does that mean two K-Dur 10s  
14 against the K-Dur 20?

15 A. That is correct.

16 Q. And sir, directing your attention to Micro-K,  
17 what's the price difference as of this time based on  
18 the data used between the Micro-K 10, taking two of  
19 those, and the K-Dur 20?

20 A. About a penny.

21 Q. And is that a significant difference between  
22 two doses, one at 41 cents and one at 42 cents?

23 A. No.

24 Q. And Klor Con 10 is cheaper than K-Dur 20. Is  
25 that part of the message?

1           A. Yes. The costs are based on the Bergen  
2   AccuSource program. So, we're careful to note that it  
3   won't necessarily reflect actual cost. It's a relative  
4   statement.

5           Q. And what's the point in this mailer of working  
6   directly with doctors in this targeted message?

7           A. We are working -- we are targeting the  
8   physicians that write K-Dur 20, and then -- or in this  
9   case Micro-K 10, and we are going up against those  
10   products to suggest that they write for Klor Con 10 in  
11   place of that because of the quality and the economic  
12   value.

13          Q. May I direct your attention, sir, to tab 16.

14          A. Yes.

15          Q. USX 839.

16          A. Yes.

17          Q. And could you identify what USX 839 is?

18          A. This is part of a little training packet, the  
19   reminders for our representatives.

20          Q. And what group within Upsher-Smith prepared  
21   this packet?

22          A. This would be our sales training.

23          Q. And who would receive this within -- who did  
24   receive this within Upsher-Smith?

25          A. The sales representatives, both our internal

1 representatives as well as our field reps.

2 Q. People doing detailing would have this?

3 A. Yes, sir.

4 Q. And directing your attention to the language,  
5 "Recommend two Klor Con 10 Tablets instead of one K-Dur  
6 20 Tablet," what's the point of this reminder for your  
7 sales force?

8 A. It just -- really, it's something to remind  
9 them when they are in front of the physicians, there  
10 are those key points, its economical price, recommend  
11 two for that, and that samples in this case are now  
12 available.

13 Q. And do you see the reference to Scott Levin  
14 Managed Care Formulary Drug Audit, fall 1999?

15 A. Yes.

16 Q. And what does that tell you about the prices  
17 that are reflected in this document?

18 A. It would say that these are based on  
19 co-payments and that the source of the reference here  
20 is the Scott Levin research that was done to compare  
21 Klor Con against K-Dur, and we're using a lower co-pay  
22 for K-Dur.

23 Q. And what does it mean where it says, "For  
24 internal use only, not for use in sales presentation"?

25 A. Well, what it means is that this is a reminder

1 to use as a sales rep, that when you get in front of a  
2 physician and you have that, for example, 30 seconds,  
3 this is points you want to do. This isn't meant to  
4 leave behind with the doctor or to mail to a doctor.

5 Q. What's the date of this document, sir?

6 A. This was in August of 2000.

7 Q. And at the top it says, "Remind physicians of  
8 these key points."

9 What does that refer to?

10 A. The key selling points that you want to make  
11 sure you get through to the doctor.

12 MR. GIDLEY: Your Honor, we move the admission  
13 of USX 839.

14 MS. BOKAT: No objection.

15 MS. SHORES: No objection, Your Honor.

16 JUDGE CHAPPELL: Which tab is that in the  
17 binder?

18 MR. GIDLEY: That is tab 16, Your Honor.

19 JUDGE CHAPPELL: USX 839 is admitted.

20 (USX Exhibit Number 839 was admitted into  
21 evidence.)

22 BY MR. GIDLEY:

23 Q. Mr. Dritsas, may I direct your attention to tab  
24 17.

25 A. Yes.

1 Q. And the exhibit there is USX 822.

2 A. Yes.

3 Q. Would you familiarize yourself with that  
4 exhibit, please?

5 A. Yes.

6 Q. And what is USX 822?

7 A. This is a compilation of potassium products  
8 that compete in the potassium market. It was put  
9 together from someone in my area, marketing, I would  
10 imagine it was probably Marie VonEnde, she works with  
11 this type of data.

12 Q. And who are some of the competitors, just  
13 looking at page 1, in potassium chloride?

14 A. Key, Ethex, Upsher-Smith, Therex. That was  
15 page 1.

16 Q. And when was this prepared, sir?

17 A. Well, let me look for a date. We know that  
18 it's products for -- in 2000. I'm not seeing the exact  
19 date when it was produced. I'm not seeing the exact  
20 date.

21 Q. Let me direct your attention to the last page.

22 A. Yes.

23 Q. There's a footnote, "The products listed here  
24 are based on IMS category 60110."

25 Do you see that?

1 A. Yes.

2 Q. Do you recognize that five-digit code?

3 A. Yes, that's their code for the KCl market.

4 Q. And we saw that earlier today, did we not?

5 A. We did, yes.

6 MR. GIDLEY: All right, Your Honor, we would  
7 move the admission of USX 822.

8 MS. BOKAT: No objection.

9 MS. SHORES: No objection, Your Honor.

10 JUDGE CHAPPELL: USX 822 is admitted.

11 (USX Exhibit Number 822 was admitted into  
12 evidence.)

13 BY MR. GIDLEY:

14 Q. By the way, before we move on to the next tab,  
15 sir, does Upsher-Smith at this time, 2000, compete with  
16 various potassium products that are listed in Exhibit  
17 USX 822?

18 A. Yes.

19 Q. Now, let's turn your attention, sir, to tab 18.

20 A. Yes.

21 Q. This is USX 386.

22 A. Yes.

23 Q. And it says on the cover in handwriting,

24 "December 2000 In line."

25 Do you see that?

1 A. Yes.

2 Q. What does that refer to?

3 A. The in-line analyses are done every month by  
4 the product managers, and they are updates on what's  
5 going on with their products, internal issues, external  
6 environmental factors, and so they're meant to keep the  
7 product plans, if you will, the marketing plans alive.  
8 They're -- so, they're on a continuum. This would be  
9 the update that was provided in that month.

10 Q. And directing your attention to the page that's  
11 been Bates numbered 202?

12 A. Yes.

13 Q. And what is this page?

14 A. This is the December update for the Klor Con 8  
15 and 10 franchise.

16 Q. Now, at this point in time, did you have a  
17 detail force in place at Upsher-Smith, a field service  
18 force?

19 A. By December, we did have. We started one in  
20 February of 2000.

21 Q. May I direct your attention, sir, to 204, page  
22 204.

23 A. Yes.

24 Q. "KV Pharmaceuticals supports the Micro-K  
25 franchise under Therex," T H E R E X, "KV's brand

1 division, with approximately 100 field sales  
2 representatives and supports its potassium chloride  
3 extended-release capsules under its generic division,  
4 Ethex."

5 Do you see that?

6 A. Yes.

7 Q. And at this point in time, were Therex and  
8 Ethex part of KV Pharmaceuticals?

9 A. Yes.

10 Q. And at this point in time, December 2000, was  
11 KV Pharmaceuticals promoting potassium through its  
12 field sales force?

13 A. To doctors, yes.

14 Q. And they were detailing potassium?

15 A. They were, yes.

16 Q. Page 206, sir.

17 A. Yes.

18 Q. We've highlighted the bullet at the bottom,  
19 "Field sales continues to promote Klor Con 10 to high  
20 decile K-Dur physicians."

21 Do you see that?

22 A. Yes.

23 Q. And at this point in time, you have not yet  
24 begun marketing Klor Con M20. Is that correct?

25 A. That's correct.



1           Q. And the reference to K-Dur, what is a K-Dur  
2     physician?

3           A. That would be a high prescriber of K-Dur 20 mEq  
4     or 10.

5           Q. What does "high decile" mean?

6           A. That means that they are among the highest  
7     prescribers. They write the highest volume of  
8     prescriptions for that product.

9           Q. Let me direct your attention now to tab 19, and  
10    what is tab 19, USX 440?

11          A. This is called our PPT packet, which is the  
12    Profit Performance Team at Upsher-Smith Laboratories.

13          Q. Okay. And directing your attention to page  
14    Bates numbered 728, under Key Notes, "1996 was a record  
15    sales year for Upsher-Smith due to the launch of  
16    Prevalite on February 23."

17                 Do you see that?

18          A. Yes.

19          Q. And was that the case with respect to the  
20    launch of Prevalite?

21          A. Yes, it was. We had introduced it in -- on the  
22    last couple of days in February, and it sold very well.

23          Q. And again, what was Prevalite? What did it do?

24          A. Prevalite lowers cholesterol. It's called a  
25    bile acid sequestrant. We were competing with

1     Questran.

2           Q.   And that was the branded drug, Questran?

3           A.   Yes, and Questran had been off patent for  
4   almost 20 years, so once again, we were the first to  
5   come in with a low-cost alternative and offer  
6   pharmacists and physicians an alternative to a more  
7   expensive brand.

8           Q.   May I direct your attention to page -- excuse  
9   me, tab 20, USX 634.  Do you see that?

10          A.   I do.

11          Q.   And the first page is a cover page, and you're  
12   one of the recipients of this package?

13          A.   Yes.

14          Q.   And directing your attention now to page 402.

15          A.   Yes.

16          Q.   What are you seeing on the page that's Bates  
17   labeled USL 15402?

18          A.   Yes.

19          Q.   What is this page?

20          A.   I'm sorry, this entire packet is part of a  
21   monthly report that we provide to Ian.  It's an OCM  
22   update, Operational Committee Meeting update, and my  
23   department provides this page.  This is the sales and  
24   marketing update.  In this case, we're referencing the  
25   month of February.

For The Record, Inc.  
Waldorf, Maryland  
(301) 870-8025

1           Q. And directing your attention to the highlighted  
2 section, bullet one, "Company sales of \$3 million," I'm  
3 rounding that, "with Prevalite and Klor Con exceeding  
4 the plan for the month and year-to-date."

5           Do you see that?

6           A. Yes.

7           Q. Was that your recollection of the sales  
8 performance of those two product groups as of February  
9 1997?

10          A. Yes.

11          Q. And the second bullet, what's the significance  
12 of, "MOST SUCCESSFUL KLOR CON DEAL IN USL HISTORY," in  
13 all caps?

14          A. Well, we sold over a million dollars in a  
15 four-week time period with our territory sales group.  
16 These are the individuals that call on the phone. We  
17 had never ever done that before.

18          Q. And your telephone sales group, how many phone  
19 calls would a telephone sales representative make on an  
20 average day?

21          A. On average, they make about 20 calls a day.

22          Q. And if we assumed about 200 business days a  
23 year, how many calls might a telephone sales rep make  
24 in a year at Upsher-Smith?

25          A. Thousands of calls.

1           Q. The third bullet says, "Drug Topics survey  
2 reveals 63% of pharmacies are stocking Prevalite."

3           What's the significance of that?

4           A. Oh, in Drug Topics, which is a journal for the  
5 pharmacy trade, they do various updates, and so this  
6 was a survey apparently that they conducted that  
7 revealed that 63 percent of the pharmacies were  
8 stocking Prevalite.

9           Q. Is that a good -- is that a good thing, that  
10 you're --

11          A. That's a really good thing.

12          Q. -- you're penetrating the pharmacies?

13          A. That's right.

14          Q. And you're less than a year out from the  
15 launch. Is that right?

16          A. That's right.

17          Q. Down at the bottom it says, "Problem Areas:  
18 Apothecan continues to bid national and large  
19 independent retail and mail order accounts on their 10  
20 mEq tablets with aggressive pricing."

21               Do you see that?

22          A. Yes, I do.

23          Q. And was that a problem in February of 1997 in  
24 the potassium market?

25          A. Yes, it was.

1           Q. And then it says, "Corrective Actions: New  
2 competitive deal strategy implemented Telephone Sales  
3 to defend and grow market share and neutralize  
4 Apothecon and Copley."

5           Do you see that?

6           A. Yes.

7           Q. And what's going on in that corrective action  
8 bullet?

9           A. That refers to the deal structures where we  
10 were looking at potentially offering different ways to  
11 incentivise independent pharmacies. Cash rebates or  
12 free goods, for example.

13          Q. And what firms were you responding to in the  
14 potassium market at that time?

15          A. We were responding to Schering with K-Dur, we  
16 were responding to Ethex, A. H. Robbins with Micro-K,  
17 and then the other -- Ciba-Geigy with Slow K and so  
18 forth.

19          Q. May I direct your attention, sir, to tab 21.

20          A. Yes.

21          Q. And what is -- what's the first page of USX  
22 635?

23          A. This is the front cover of the OCM committee  
24 notes again, the monthly reports, and this is for the  
25 month of May in 1997.

1 Q. And directing your attention to the next page,  
2 456.

3 A. Yes.

4 Q. Month of April, 1997, Sales and Marketing?

5 A. Yes.

6 Q. Do you see that?

7 Did your group prepare this document?

8 A. Yes, we did.

9 Q. So, this particular page of this exhibit would  
10 be your function, sales and marketing?

11 A. That's correct.

12 Q. It says in highlights, "Prevalite movement at  
13 McKesson up 51% during April compared to March movement  
14 through their DCs."

15 Do you see that?

16 A. Yes.

17 Q. What is McKesson?

18 A. McKesson is a wholesaler.

19 Q. And McKesson sells to -- who are its customers?

20 A. Primarily independent pharmacists, but they  
21 would also provide product for regional chains, smaller  
22 chains.

23 Q. Was that gain a significant sales gain?

24 A. Yes, 51 percent is very significant.

25 Q. Was it significant that it was that large a

1       jump at that sized account?

2           A. Absolutely. McKesson at that time was number  
3       one or number two in terms of the wholesalers in the  
4       United States.

5           Q. And it says, "through their DCs."

6           What's a DC in this context, sir?

7           A. The dist -- DC stands for the distribution  
8       center, so McKesson is headquartered in San Francisco,  
9       but they have distribution centers all across the  
10      United States that basically provide a warehouse  
11      function for the chains and the independent pharmacies,  
12      mail order, nursing home, other customers of theirs.

13          Q. We were talking earlier about the launch of M20  
14      and meeting with firms like McKesson. Do you recall  
15      that testimony?

16          A. Yes.

17          Q. You talked about a lead time that some  
18      wholesalers need. Do you recall that?

19          A. Yes, I do.

20          Q. You said something about stocking the units.  
21      Is that a reference to these DCs?

22          A. Yes. The headquarters, when you launch a  
23      product, for example, you need to go out to the  
24      headquarters, and you need to work with the people  
25      there who have buying responsibilities to make sure

1     that you can get the product stocked, and they decide  
2     on what quantities. They also have the responsibility  
3     for deciding which DCs will get what amount.

4             And then they need time in order to get this  
5     into their system, their IS people have to do it and so  
6     forth. Once that information is on the system, the  
7     numbers are loaded, they have to send that information  
8     out to the inventory control managers, who in turn  
9     analyze that, send back information to tell them what  
10    the logistical requirements will be, what carriers they  
11    would prefer, and then they put all of that together,  
12    and that's why they prefer the 60-day notice, and  
13    they're ready to cut a PO for you.

14            And when you ship from Upsher-Smith, for  
15    example, in this case, it doesn't go to McKesson  
16    headquarters. It's going to each distribution center.

17            Q. May I direct your attention, sir, to tab 22,  
18    USX 591.

19            A. Yes.

20            Q. And could you identify this, please? What is  
21    USX 591?

22            A. If I could just take a moment.

23            Q. Please.

24            A. (Document review.) This is part of the  
25    Prevalite marketing plan. It's dated 8/13/1997.



1 Q. And would this have been prepared by someone  
2 within your group?

3 A. Yes, the -- whoever had product management  
4 responsibility for this.

5 Q. It says, "Key Dates," under that, "Commercial  
6 Launch, March 1, 1996."

7 Do you see that?

8 A. Yes.

9 Q. Does that sound accurate?

10 A. It was actually February, but yes.

11 Q. Okay. It's close, it's approximate?

12 A. It's close, yes.

13 Q. All right. "Product Rationale:

14 "Prevalite packets, introduced March 1, 1996  
15 have become the second greatest revenue generator in  
16 USL."

17 Do you see that?

18 A. Yes.

19 Q. And was that, in fact, the case as of the time  
20 of this memo on August 13, 1997?

21 A. That's correct.

22 Q. And what does the first part of the next  
23 sentence mean, "1996 Prevalite packet sales totaled \$7  
24 million"?

25 A. That would be the sales revenue in 1996, and

1     then in 1997, these are the projected sales, \$8.8  
2     million.

3           Q. And you were projecting growth in the Prevalite  
4     sales at this point in time?

5           A. Yes.

6           Q. And the date of this document, again, is August  
7     '97. Is that correct?

8           A. That's correct.

9           Q. Down below it says, "Prevalite sales throughout  
10    1997 have been above plan."

11           What's the significance of that?

12           A. It means that we're selling more than we had  
13    planned on selling. We started out the year with a  
14    planned increase in sales, so growth from \$7 million to  
15    \$8.8 million, and at this point in time, we were  
16    actually trending ahead of that plan. So, we're  
17    growing faster than we had anticipated.

18           Q. What does it mean where it says, "Customer  
19    loyalty is high"?

20           A. It means that the customers are stocking our  
21    product, they are loyal to our product.

22           Q. Now, was Prevalite a branded generic?

23           A. Yes.

24           Q. And you were the only firm using the name  
25    Prevalite. Is that correct?

1 A. Yes.

2 Q. I see. Let me direct your attention now to tab  
3 23, please, sir.

4 A. Okay.

5 Q. And what is USX 660, once you have had a chance  
6 to familiarize yourself with it?

7 A. Yes, if you can just give me -- (document  
8 review.) This is an update on the marketing plan.  
9 This is -- the information included in here would  
10 provide the basis for the following year's marketing  
11 plan. It was done on October 1st, 1997 with regard to  
12 Prevalite.

13 Q. What does "Rev No 4," revision number 4 mean?  
14 Is that the right way to read that?

15 A. Revision number 4 means there are at least  
16 three others of these that are around.

17 Q. Well, in fact, directing your attention back to  
18 the previous exhibit, USX 591.

19 A. Yes.

20 Q. And is that revision number 1?

21 A. That's right.

22 Q. So -- and some of the language is the same,  
23 like the first sentence is the same between the two  
24 documents. Would one -- the revision number 4 work off  
25 of number 1?

1           A. Right. If you think of these documents really  
2 as templates, then what the product manager is doing is  
3 putting in key assumptions, key dates, and then as we  
4 go along, we revise them. So, you're seeing the  
5 difference between August 13th, 1997 to October 1st,  
6 now we're on the fourth revision of this plan.

7           Q. It says in the yellow highlighted sentence, "In  
8 a strange move, BMS has transferred the Questran and  
9 Questran Light brand to Apothecan. Apothecan will also  
10 have their own generic cholestyramine --" how do you  
11 say that?

12          A. Cholestyramine.

13          Q. " -- cholestyramine, which is the same product  
14 as Questran and Questran light with generic labeling."

15               Do you see that?

16          A. Yes.

17          Q. And why was that a strange move?

18          A. Well, we were the only two products at that  
19 time, the Questran and -- the Questran Light and then  
20 the Prevalite, and it's an unusual move. It's not  
21 uncommon for a company to give to their generic partner  
22 or their generic arm, if you will, a generic version of  
23 their brand, and then they continue to market their  
24 brand and the generic arm markets the generic version.  
25 With the K-Dur product, K-Dur can be kept as a brand

1 with Key/Schering. Warrick can then sell their generic  
2 version of that.

3 In this case, they actually took the brand and  
4 gave it to Apothecon and then also developed a generic  
5 under Apothecon. So, they had both.

6 Q. And was this a -- something you were expecting  
7 or was it a surprise?

8 A. No, it's -- as it says, I think it's kind of a  
9 bizarre move. I didn't -- I still don't understand the  
10 rationale for it. It's not something we were  
11 expecting.

12 It did create concern for us, because as you  
13 know, we had lost business to Apothecon in our  
14 potassium business because of the way they price  
15 products.

16 Q. And on the next page, Current Issues.

17 A. Yes.

18 Q. The highlighted first bullet says, "BMS --" is  
19 that Bristol-Myers Squibb?

20 A. It is.

21 Q. "-- gives brand to Apothecon. There no longer  
22 is an innovative -- an innovator brand at a price  
23 premium."

24 Do you see that?

25 A. Yes.

1           Q. So, how do we interpret that first bullet?  
2           What does that mean?

3           A. That refers to what I said before. They had  
4           virtually taken the brand, given it to their generic  
5           arm, so now Questran is genericized. It's no longer  
6           promoted to doctors, it's no longer promoted as a  
7           brand.

8           Q. It says in the next bullet, "Consider entire  
9           market generic."

10          A. Yes.

11          Q. What does that mean?

12          A. Well, it means that it changes now the market  
13          dramatically, and, in fact, did change Prevalite.

14          Q. And it says, "Threats," up above, "BMS  
15          genericizes brand to Apothecon. Price competition will  
16          become only selling point if there is no true brand."

17                 Do you see that?

18          A. Yes.

19          Q. Is that also a reference of this transfer from  
20          Squibb to Apothecon?

21          A. Yes, it is.

22          Q. May I direct your attention to page 263.

23          A. Yes.

24          Q. Again, this is within USX 660 dated October 1,  
25          '97.

1 A. Yes.

2 Q. "Current Issues: Apothecon enters market.  
3 From our Klor Con experience, we know them to be a deep  
4 discounter which also provide large rebates on their  
5 bundles of products."

6 Do you see that?

7 A. Yes.

8 Q. And what does "deep discounter" mean in this  
9 context?

10 A. Well, it means that they compete on price and  
11 volume.

12 Q. And does it mean that they make small price  
13 reductions or big ones?

14 A. Large price reductions, and they have a large  
15 product line, so they bundle all of their products  
16 together. So, if you're the competitor and you come  
17 in, for example, and you say, well, I have a  
18 competitive price, your customer might say, well, I get  
19 a rebate on 100 SKUs from Apothecon, and you only have  
20 three or four products with me, so...

21 Q. Let me direct your attention to tab 24, please,  
22 USX 837.

23 A. Yes.

24 Q. And would you describe USX 837, please?

25 A. I will. This was a bid offer, if you will, on

1     our Klor Con M20, 100 and 1000, and our Klor Con M10,  
2     100 and 1000, to Merck-Medco, a PBM, which also has a  
3     mail order, and in this, we were extending contract  
4     terms which would give Merck-Medco a very favorable  
5     proposed contract price. The term looks to be about a  
6     year and a half.

7           Q. And were the terms favorable to Merck-Medco in  
8     your view?

9           A. Yes. As a matter of fact, at the time this was  
10    extended, I think it was more favorable terms.

11          Q. What's the approximate date of this document?  
12    When would this have been created, Mr. Dritsas?

13          A. Well, the contract goes from September 1 to  
14    December 31st, so this would have been literally the  
15    first week we had the product available.

16          Q. So, early September 2001, sir?

17          A. September 4th perhaps.

18          Q. And what happened? Did Merck-Medco wind up  
19    accepting this contract and signing this up and buying  
20    the product?

21          A. No, they did not. They have a more favorable  
22    situation with the K-Dur product.

23          Q. And is that the K-Dur 20 product?

24          A. Yes.

25          Q. And did you yourself have contact with



1 Merck-Medco or was someone handling that within  
2 marketing?

3 A. Mike McBride actually through sales would have  
4 handled that.

5 Q. But did you monitor the activity on that  
6 account?

7 A. Yes.

8 Q. And is that because it's a sizeable account?

9 A. Yes.

10 MR. GIDLEY: We would move the admission, Your  
11 Honor, of USX 837.

12 MS. BOKAT: No objection.

13 MS. SHORES: No objection.

14 JUDGE CHAPPELL: USX 837 is admitted.

15 (USX Exhibit Number 837 was admitted into  
16 evidence.)

17 BY MR. GIDLEY:

18 Q. Mr. Dritsas, please turn to tab 25. The  
19 exhibit there is a demonstrative. I simply want you to  
20 identify it, if you would, please. It's USX 1554 --

21 A. I'm sorry, you asked me for tab --

22 Q. Twenty-five.

23 A. Okay, thank you. Yes?

24 Q. And I simply would like you to identify this  
25 printout of the Qualitest label.

1 And if I may approach, Your Honor?

2 JUDGE CHAPPELL: Yes, you may.

3 BY MR. GIDLEY:

4 Q. Would you compare it to this bottle? And I've  
5 just handed you a bottle of Qualitest tablets.

6 A. Yes.

7 Q. And are they the same?

8 A. They are the same.

9 Q. And the Qualitest label, it says,  
10 "Manufacturing for" and "Manufacturing by."

11 A. Yes.

12 Q. Could you read that to the record, please?

13 A. It says, "Manufactured for Qualitest  
14 Pharmaceuticals, Incorporated, Huntsville, Alabama,  
15 35811. Manufactured by Upsher-Smith Laboratories,  
16 Incorporated, Minneapolis, Minnesota, 55447."

17 Q. And what's the revision date down below?

18 A. Revision 0901.

19 Q. And what does that signify?

20 A. That would have been September of '01.

21 Q. And for the record, this is potassium chloride  
22 extended release tablets, microencapsulated, 20 mEq.  
23 Is that correct?

24 A. That's correct.

25 Q. And is this product fully substitutable with

1 the K-Dur 20 product?

2 A. Yes.

3 Q. And in fact, it's identical pharmacologically  
4 and therapeutically with your own product, the Klor Con  
5 M20 product. Is that correct?

6 A. That's correct.

7 Q. Let me direct your attention, if I could,  
8 now -- you can set that aside.

9 A. Oh, thank you.

10 Q. May I direct your attention, sir, to tab 26.

11 A. Yes.

12 Q. And what is tab 26?

13 A. This is a page from the Schering-Plough web  
14 site.

15 Q. Earlier today, we talked, you and I, about some  
16 production problems that you learned about with the  
17 K-Dur product line. Do you recall that testimony?

18 A. Yes.

19 Q. Is that what's described by this company press  
20 release at Schering-Plough?

21 A. Yes.

22 Q. What is GMP?

23 A. Good manufacturing practices.

24 Q. Is that a term of art? Is that a special term  
25 in your industry?

1 A. I believe it is, yes.

2 Q. In fact, it's a regulatory term, isn't it?

3 A. It is.

4 Q. All right, let's go on to tab 27, if we could.

5 Tab 27 is CX 1586, and it's a document that's been used  
6 earlier in this proceeding. I just want to direct your  
7 attention to a couple of months here.

8 Can I direct your attention to the dots on the  
9 top line, Mr. Dritsas, to May, June, July and August?

10 A. Yes.

11 Q. And from May through August, what has happened  
12 according to this slide to the sales of K-Dur 20?

13 A. Well, the estimated prescriptions are going  
14 down, so the sales are going down. It looks to me to  
15 start around the July time period, you see quite a dip  
16 from July to August, then again August to September,  
17 and then probably that's the most significant decline,  
18 and then September, October, November, it continues.

19 Q. In the month of August 2001, was it possible  
20 for a doctor in the United States to write a  
21 prescription for Klor Con M20?

22 A. No, it was not possible. We didn't have the  
23 product on the market.

24 Q. And certainly if a doctor did write a  
25 prescription for Klor Con M20, if you presented it to a

1 pharmacy, it couldn't have been filled in August of  
2 2001, could it?

3 A. It couldn't have been filled and we wouldn't  
4 have promoted it to a doctor, so no prescriptions would  
5 have been generated.

6 Q. Your sales and shipment of the Klor Con M20  
7 product occurred in the month of September 2001. Is  
8 that correct?

9 A. That's correct.

10 Q. Now, we were talking earlier about A-B  
11 substitution. Do you recall that?

12 A. Yes.

13 Q. Now, I see that there is a drop between August  
14 and September, October and November, on this top line  
15 that appears to relate to K-Dur 20. Do you see that?

16 A. Yes.

17 Q. What effect would state substitution laws have  
18 based on your experience with K-Dur 20?

19 A. Well, as of September 1, as soon as the  
20 approval or in this case the launch of a lower cost  
21 generic equivalent to K-Dur occurred, then certain  
22 states will mandate at that time to pharmacists that  
23 for Medicaid patients, you cannot fill the prescription  
24 with K-Dur. You must use a lower cost alternative.

25 Q. What's the effect on competition for the 20 mEq

1 product of the state laws that prohibit the use of  
2 K-Dur 20?

3 A. Well, in essence, they're blocking K-Dur from  
4 competing with that patient segment.

5 Q. Now, in the time period September, October and  
6 November, have you gotten any feedback from your  
7 customers about K-Dur 20 supply issues?

8 A. Well, as I said earlier, we discovered the  
9 supply issues before it was ever made public in The  
10 Pink Sheet or on their web page from talking with our  
11 customers, the independents in the summer, and then  
12 around the August time frame, we heard it officially  
13 from Rite Aid and from Walgreens.

14 The effect that it had on our own production  
15 for our Klor Con 10 and 8 is that we had an increased  
16 demand for it.

17 Q. Is some of the reason for the drop in  
18 September, October and November in your view due to the  
19 supply problems that you were hearing about from your  
20 customers?

21 MS. BOKAT: Objection, leading.

22 MR. GIDLEY: I can rephrase it, Your Honor.

23 JUDGE CHAPPELL: Okay.

24 BY MR. GIDLEY:

25 Q. What's your view, sir, of the effect of the

1 supply problems in September, October, November on the  
2 TRX dots that appear in CX 1586?

3 A. Well, that's really what I was going to say, is  
4 that to my knowledge, K-Dur is still not back in full  
5 supply for many of the customers with whom we provide  
6 business, and so when I look at this, what it shows me  
7 is that prior to the launch of any competitor, they  
8 began to have a steep decline in their sales that could  
9 not possibly have been related to competition from Klor  
10 Con. We weren't on the market. And in fact, it -- my  
11 assumption would be that it has to do with their supply  
12 problems.

13 This decline, then, in addition to a generic  
14 competitor and in addition to state programs that would  
15 mandate substitution after September 1st, all of these  
16 would be factors affecting their sales.

17 Q. May I direct your attention now to tab 28, USX  
18 1556.

19 A. Yes.

20 Q. And this is a similar chart, but it's done in  
21 the context of K-Dur 10 and Klor Con M10.

22 A. Yes.

23 Q. And it has a similar shape as CX 1586, does it  
24 not?

25 A. Yes, it does.

1           Q. And when's the first month that you began to  
2 sell Klor Con M10?

3           A. In September.

4           Q. And we can see that up above in the data up at  
5 the top where it says 41 under September '01. Is that  
6 correct?

7           A. That's correct.

8           Q. And you've also got sales in October and  
9 November?

10          A. That's correct.

11          Q. Do you have any understanding from customers as  
12 to whether K-Dur 10's sales have been affected by  
13 supply problems?

14          A. My understanding is both the K-Dur 20 and the  
15 K-Dur 10 were affected. I had heard, though I can't  
16 substantiate this as fact, that they're both made out  
17 of the same facility.

18          Q. And when you're talking about K-Dur 10 having  
19 supply problems, what time period are you talking  
20 about?

21          A. We noticed it in the summer. Again, we heard  
22 about it early in late June, but certainly in July and  
23 August, that's when it became very evident.

24          Q. And sir, turning to the next tab, USX 1557 is  
25 simply the same data done in color without the data



1 box. Is that correct? Take a minute if you need to.

2 This is your product versus K-Dur 10.

3 A. I'm sorry, so under tab 29, is that where  
4 I'm --

5 Q. That's right, compare tab 29 with tab 28, if  
6 you would.

7 A. To tab 28.

8 Q. Right.

9 A. Okay, so I'm looking at potassium chloride  
10 products -- yes, the K-Dur 10 versus our generic,  
11 sorry.

12 Q. And where it says "Generic K-Dur 10," that  
13 would be your Klor Con M10?

14 A. That's correct.

15 Q. And that's in USX 1557, right?

16 A. That's correct.

17 Q. All right, let's just set that aside.

18 I may not have asked you this, I just want to  
19 cover this and make sure I've got a clear record, is  
20 Prevalite cholestyramine?

21 A. It is.

22 Q. Did I say that right?

23 A. Yes.

24 Q. I want to shift gears and talk a little bit  
25 about Niacor-SR.

1           A.   Okay.

2           Q.   When's the first that you can recall learning  
3           of the development of the Niacor-SR product at  
4           Upsher-Smith?

5           A.   Well, I heard about it in the late eighties.  
6           My first conversation about it was with my boss at that  
7           time, who was vice president of sales and marketing,  
8           Kade Kadrie, and he asked me -- we were already in the  
9           niacin market with an extended release dietary  
10          supplement, and he asked how would I like to have a  
11          \$250 million product? How would I like to have a  
12          product that's -- you know, there's no generic  
13          equivalent to it, something that we could get a field  
14          force behind, something that would really change the  
15          whole dynamics of Upsher-Smith?

16                 Remember, we were probably around \$20 -- \$20  
17          million at that time in total company revenues. So, I  
18          knew enough about niacin to think that this was a  
19          really exciting opportunity.

20                 The early response that we had, when we talked  
21          to doctors, is that if any pharmaceutical company would  
22          really get behind this drug and promote it and do the  
23          educational things, that it's the perfect drug for  
24          treating dyslipidemia. So, I was very excited.

25          Q.   I understand you're not a doctor. Is that

1 correct?

2 A. I'm not a doctor.

3 Q. What is your understanding of the efficacy of  
4 Niacor-SR?

5 A. Well, it affects all the lipid parameters. It  
6 lowers LDL, it raises HDL, it affects triglyceride.  
7 There's no single agent that a physician could  
8 prescribe at that time that could do all of that  
9 effectively, and in fact, while niacin isn't the most  
10 effective agent used for lowering LDL, there still is  
11 today no better agent used for raising HDL, and HDL is  
12 now an independent risk factor. So, it's the perfect  
13 drug for treating dyslipidemias.

14 Q. At the time that Upsher-Smith began to work on  
15 Niacor-SR, had the company had an NDA innovator product  
16 before?

17 A. No. No, that was the other really exciting  
18 thing about it, because, you know, we were going to put  
19 an awful lot of resources into this, and it would take  
20 time, but this was different. We weren't coming up  
21 with an ANDA generic which we would then brand and we  
22 would compete against brands and other generics like we  
23 did in the crowded potassium market. This was an  
24 opportunity to have our very own proprietary product  
25 that we would promote to doctors, we would generate

1       prescriptions for it, and it's a good drug.

2           Q.   Let's now fast forward to the 1996-1997 time  
3       frame.

4                   What were your expectations for the sales in  
5       the United States of Niacor-SR say in the first six  
6       months of 1997?

7           A.   My personal viewpoint on the first six months  
8       of 1997?

9           Q.   At that time frame, in the first six, anywhere,  
10       you know, March of '97 or June of '97, what was your  
11       expectation for the future potential --

12          A.   Oh, the future, I'm sorry.

13          Q.   -- sales of Niacor-SR?

14          A.   I always thought that the product would do at  
15       least \$100 million, and I was hopeful that it could do  
16       \$250 million.  Certainly the research that we had done  
17       earlier indicated, when you look at the epidemiology of  
18       patients for whom niacin would be appropriate therapy,  
19       either in monotherapy or in combination with some other  
20       product, like the statins, there's no reason to believe  
21       it couldn't be, and Kos was coming out with a product  
22       around that same time, and certainly based on their  
23       valuation in the market on a single product, there were  
24       many who believed that that was realistic.

25                   I moderated it somewhat at that time to \$100

1 million just based on the resources that we had, and I  
2 felt very strongly that we could do that and then grow  
3 it from there.

4 Q. In the -- let's say, again, let's say we're  
5 talking about June 1997, at that point in time, for  
6 Niacor-SR to reach its full potential in the U.S., what  
7 kind of sales and marketing effort were you thinking or  
8 did you have in mind?

9 A. Well, I was thinking at least 150 salespeople,  
10 and we would need to do programs that up to this point  
11 in time we had never done at Upsher-Smith, some of the  
12 type of educational programs and seminars and other  
13 things that you do with physicians. So, I was very  
14 excited about it.

15 Q. How did Niacor-SR, say from the vantage point  
16 of June 1997, how did it fit into your overall product  
17 line, what you were selling at that time?

18 A. Well, it was great. It was cardiovascular, and  
19 then it provided us with a subset in lipidemiology. We  
20 already had Prevalite, so that was used for lowering  
21 cholesterol. We had an immediate release niacin and an  
22 extended release niacin. So, it was a great way to  
23 expand in an area where we had already some presence,  
24 albeit small compared to maybe a major pharmaceutical  
25 company, and also it would capitalize on the knowledge

1 we had. We know an awful lot and did know an awful lot  
2 at that time about niacin and its positive effects.

3 Q. Were you looking forward to the future of  
4 developing a field sales force in June of 1997?

5 A. Yes, I was.

6 Q. And you've testified earlier that you did start  
7 a field sales force. What product launched that sales  
8 force?

9 A. Pacerone.

10 Q. And is that a heart drug, cardiac drug?

11 A. Yes, that's for rhythm management.

12 Q. What was the cost approximately of the  
13 Niacor-SR development effort, say in the June 1997 time  
14 frame, for Upsher-Smith?

15 A. As I recall, by that time, I think we had  
16 invested about \$13 million.

17 Q. Had you yourself made any sacrifices in the  
18 development of Niacor-SR at this time, June of '97?

19 A. Yeah, many of us had made sacrifices. This was  
20 a very large resource burden for us, but we had great  
21 hopes for its future. We put a tremendous amount of  
22 our budgeted expenditures that would have gone into  
23 marketing, that could have gone into Klor Con, that  
24 might have gone into other areas and other products,  
25 but instead went towards our expenditure budget for the

1       Niacor.

2               On a personal level, I gave up a bonus for  
3       about three or four years in a row, along with other  
4       executives within the company, because the profits  
5       weren't there to fund a bonus program, and for me at  
6       that time, the bonus was about 30 percent of my annual  
7       wage.

8               Q.   I want to shift gears a little bit.

9               Did Upsher-Smith view K-Dur 20 as a monopoly  
10      product?

11              A.   No.

12              Q.   Do you recall -- I'm sorry, are you finished?

13              A.   We never viewed it as a monopoly product. I  
14      never spoke to anyone in the industry who ever viewed  
15      it as a monopoly product. I never talked to a  
16      physician who ever viewed it as something for which  
17      there weren't numerous other alternatives.

18              Q.   How about pharmacists, either chain or  
19      independent pharmacists, did they ever talk about K-Dur  
20      20 as a monopoly?

21              A.   No. In fact, they were -- we were successful  
22      in getting many of them to substitute two 10s for a 20.

23              MS. BOKAT: Your Honor, I object to the answer.  
24      I believe it's hearsay. I move to strike it.

25              MR. GIDLEY: I only offer it, Your Honor, for

1 state of mind. This is, after all, one of the key  
2 competitors of K-Dur 20, and it's relevant to what they  
3 thought and saw in the market and what market feedback  
4 they were getting from market participants. And again,  
5 we don't offer it for the truth of the matter asserted.

6 JUDGE CHAPPELL: With that understanding of how  
7 you're offering it, then I'll overrule the objection.

8 BY MR. GIDLEY:

9 Q. Different topic.

10 I want to talk a little bit about M20 and I  
11 want to talk a little bit about your understanding of  
12 the lawsuit, and I know you weren't directly involved  
13 in the lawsuit. Is that correct?

14 A. That's correct.

15 Q. Now, sir, at some point in time, the '743  
16 lawsuit, the patent lawsuit, was settled between  
17 Schering and Upsher-Smith. We talked about that  
18 earlier.

19 A. Yes.

20 Q. And in that settlement, there's a provision --  
21 and I'm not calling for your recall -- but there's a  
22 provision that would ultimately permit your company to  
23 market the M20 drug in September of 2001. Did you have  
24 that understanding?

25 A. Yes.



1           Q. Now, sir, was there any other product, other  
2           than the Klor Con M20 product, that was in your  
3           pipeline that you thought about using to get around the  
4           '743 patent after the settlement of the litigation?

5           A. No.

6           Q. I want to talk to you a little bit about  
7           Upsher-Smith and consumer benefit.

8                     What effect has Upsher-Smith had on consumers  
9           of potassium?

10          A. Well, I -- from the very beginning, I think  
11          we've been the company that's been willing to put  
12          resources behind promoting a low-cost alternative in an  
13          area of therapy where patients are potentially older,  
14          they're on fixed incomes, they're on a -- numerous  
15          other prescription products, about six or seven, and  
16          they're going to take it for the rest of their lives.

17                     We came out with Klor Con powder, we were the  
18          first company to really fight against Klor, and that  
19          was a more expensive product. The effervescent, Klor  
20          Con 8 and 10 were the first products that were priced  
21          as a low-cost alternative, and by the way, those were  
22          B-X rated products. We could have priced them as  
23          brands. We could have gone out to doctors. We could  
24          have generated prescriptions for them. We chose not  
25          to. We chose to continue to provide that.

1           And even today, when I go in the field with  
2    reps, we get to see doctors who typically will not  
3    allow pharmaceutical reps to come in just based on the  
4    fact that we can talk to them and say, now, wait a  
5    minute, we have low-cost alternatives for prescriptions  
6    that you're writing every day for maintenance therapy  
7    for patients like K-Dur, like lipid-lowering agents,  
8    and there are many physicians, most of which I will say  
9    are receptive to that, and they'll let us talk about  
10   it. So, that's always been our position.

11           Q. New topic.

12           In all the time that you have been the head of  
13   sales and marketing for Upsher-Smith, have you ever  
14   sought to grow Schering-Plough's sales at the expense  
15   of your own company's sales?

16           A. Absolutely not. I compete with Schering.

17           Q. Have you ever eased up on Schering-Plough in  
18   the potassium market?

19           A. No. In fact, every year, as we grew, as I had  
20   more resources available, we deployed more and better  
21   ways to compete in that market, and I think our  
22   Economical K really was one of the best things that we  
23   did in order to shift prescriptions away and also  
24   convince pharmacists to make a therapeutic  
25   substitution.

1 Q. Did you ease up in any way on Schering-Plough  
2 after June 1997 in the potassium market?

3 A. Absolutely not. In fact, we put more resources  
4 towards going after that market.

5 Q. Sir, the allegation in the complaint is that  
6 your company accepted a payment not to compete and to  
7 delay entry and the M20 product introduction until  
8 September 1, 2001. Sir, do you believe that your  
9 company was paid to stay off the market in the  
10 marketing of M20?

11 A. Absolutely not.

12 MR. GIDLEY: Your witness.

13 JUDGE CHAPPELL: Cross?

14 MS. BOKAT: Yes, please, Your Honor.

15 CROSS EXAMINATION

16 BY MS. BOKAT:

17 Q. Good afternoon, Mr. Dritsas.

18 A. Good afternoon.

19 Q. You talked with Mr. Gidley earlier today about  
20 the marketing plans that your department prepared. You  
21 did that on an annual basis, did you not?

22 A. They were officially handed in on an annual  
23 basis, but as we talked about in those revisions,  
24 sometimes they were done continuously.

25 Q. But they were done at least annually, right?

1 A. Yes, ma'am.

2 Q. The marketing plan was a blueprint for strategy  
3 and tactics for your department, wasn't it?

4 A. Yes.

5 Q. And it was also used to talk about the budget  
6 your department would have for the upcoming year,  
7 correct?

8 A. There would be expenditures that would be  
9 included in that as well, yes.

10 Q. And you personally reviewed the marketing  
11 plans, correct?

12 A. Yes, I did.

13 Q. And you sent the marketing plans on to Mr.  
14 Troup, the president of the company?

15 A. Yes, I did, but the final version, probably not  
16 the revisions.

17 Q. But he saw the final version?

18 A. Yes.

19 Q. Ms. Hertzman, would you pull up CX 19, please.

20 Your Honor, may I approach the witness, please?

21 JUDGE CHAPPELL: Yes, you may. I don't need it  
22 if it's going to be displayed.

23 MS. BOKAT: It looks like we're --

24 JUDGE CHAPPELL: I especially don't need that,  
25 whatever that is. Is that an exhibit?

1 MS. BOKAT: I beg your pardon?

2 JUDGE CHAPPELL: Is that an exhibit?

3 MS. BOKAT: It's the first page of an exhibit.

4 It's a multipage exhibit.

5 JUDGE CHAPPELL: Okay, thank you.

6 BY MS. BOKAT:

7 Q. Mr. Dritsas, I've handed you CX 19.

8 A. Yes.

9 Q. That's one of your department's marketing  
10 plans, is it not?

11 A. Yes.

12 Q. In fact, it's the 1997 marketing plan.

13 A. Yes.

14 Q. If we look at the page that's Bates numbered  
15 15228.

16 A. Yes.

17 Q. Toward the top of the page, and I don't know  
18 whether it's easier for you to use the paper or the  
19 screen --

20 A. I think I'll use the paper, thank you.

21 Q. That's your copy.

22 A. Okay.

23 Q. Looking at the second sentence, it reads, "This  
24 market has been relatively flat, trending toward the 20  
25 mEq slow-release tablet."

1           That's a reference to K-Dur 20, is it not?

2           A. That's correct.

3           Q. So, the market had been moving away from the  
4 other potassium chloride supplements toward K-Dur 20,  
5 correct?

6           A. Yes.

7           Q. You mentioned earlier in the day when talking  
8 with Mr. Gidley that I believe it was today, the  
9 typical patient is on 40 mEqs of potassium chloride a  
10 day. Back in this time period of late 1996, early  
11 1997, weren't patients typically on 20 mEqs a day?

12          A. That was our thought, that again, there was  
13 probably a range, but that it was fair to say at that  
14 time, for whatever reasons, they were -- they were  
15 typically dosed 20 milliequivalents a day.

16          Q. So, at that time, a patient on a typical dosage  
17 could get the potassium chloride they needed from one  
18 K-Dur 20 tablet, correct?

19          A. That's right. That's assuming they could  
20 swallow it, and that's the only caveat to that. It's a  
21 large tablet.

22          Q. At that time, Schering was marketing K-Dur 20  
23 as an innovative product, was it not?

24          A. Yes.

25          Q. And Schering was using a marketing message of

1 dosing flexibility?

2 A. Yes.

3 Q. And Schering was also using a marketing message  
4 of patient compliance?

5 A. That was their marketing message, yes. I  
6 wasn't aware of any studies or anything, but certainly  
7 from a marketing perspective, that was their -- what I  
8 would call their pitch.

9 Q. And the market was moving toward the K-Dur 20.

10 A. Yes. As a matter of fact, at the expense of  
11 the 8s and 10s.

12 Q. So, at that time, K-Dur 20 was increasing in  
13 both dollar and unit sales, was it not?

14 A. Yes.

15 Q. Currently, now that you have your Klor Con M20  
16 product on the market, that's the generic of K-Dur 20,  
17 right?

18 A. Yes.

19 Q. You market your Klor Con M20 as more convenient  
20 than potassium chloride powders, do you not?

21 A. Yes, that's our pitch.

22 Q. And is another part of your pitch that your  
23 Klor Con M20 is more convenient than the effervescent  
24 tablets?

25 A. I don't know if we make a specific comparison

1 to it, but sure, we do in general promote it as a  
2 convenient product.

3 Q. In the time period from 1996 through 2001, the  
4 price of potassium chloride powders and effervescents  
5 was flat, was it not?

6 A. I believe so.

7 Q. During that time period, the prices of the 8  
8 and 10 tablets were eroding, were they not?

9 A. Yes.

10 Q. So, the 8 and 10 prices were going down.

11 A. Yes, there was multiple generic entries and a  
12 lot of pricing pressures.

13 Q. But for K-Dur 20, their price was holding  
14 steady in that time period, was it not?

15 A. Well, we always thought they were priced  
16 competitively, and one of the notes that we made later  
17 on was that they were beginning to compete within  
18 certain segments to hold onto business as a result of  
19 what we felt was the competitive pressures in the  
20 generic market.

21 MS. BOKAT: Your Honor, may I approach the  
22 witness, please?

23 JUDGE CHAPPELL: Yes, you may.

24 MS. BOKAT: That's CX 1100, which I believe Ms.  
25 Hertzman has managed to pull up on the computer.



1 JUDGE CHAPPELL: Okay, thank you, I don't need  
2 it.

3 BY MS. BOKAT:

4 Q. Mr. Dritsas, looking at CX 1100, that's another  
5 marketing plan for your department, is it not?

6 A. It looks like from the cover page that these  
7 are all of our marketing plans.

8 Q. And in fact, I think you talked about this  
9 marketing plan this morning with your counsel under his  
10 exhibit number.

11 A. I think I did, yes.

12 Q. Would you turn, please, to the page within  
13 CX 1100 that has the Bates number 16085.

14 A. Yes.

15 Q. And I'm going to be asking you a question about  
16 the second paragraph.

17 A. Okay, if I could just take a minute here.

18 Q. By all means.

19 A. (Document review.) Okay.

20 Q. Okay. There's a sentence in that paragraph, I  
21 believe it's the second to last sentence, which reads,  
22 "The 20 mEq segment is holding an ASP of 0.34/tablet  
23 verses (sic) the dramatically eroding ASP in the 8 and  
24 10 mEq markets."

25 I think you said earlier in the day that ASP is

1 average sales price?

2 A. Average selling price, yes.

3 Q. So, according to this sentence, for the 20 mEq,  
4 that ASP was holding at 34 cents a tablet, right?

5 A. Yes.

6 Q. Whereas the ASP for the 8 and 10 mEq tablets  
7 was dramatically eroding, correct?

8 A. That's correct.

9 Q. You were talking earlier about pharmacists at  
10 the retail pharmacy level dispensing potassium  
11 chlorides. If the pharmacist receives a prescription  
12 written for a 20 mEq tablet, without calling the  
13 physician, he can't simply substitute an 8 or 10  
14 tablet, can he?

15 A. That's right, unless -- no, that's right.

16 Q. So, the pharmacist would first have to call the  
17 doctor's office and get in touch with a doctor or a  
18 nurse to get an authorization, correct?

19 A. That is correct. The exception to that might  
20 be the example I used earlier, we discovered when there  
21 was --

22 Q. Well, the answer is that's correct, right?

23 A. Yes, unless it's a chain.

24 Q. So, the --

25 A. That's the answer, unless it was a chain.

1 Q. So, a chain pharmacist wouldn't have to call  
2 the doctor? An independent does but not a chain  
3 pharmacist?

4 A. My basis for that is, for example, when K-Dur  
5 wasn't available, Walgreens put into their system,  
6 "Simply use two 10s." So, my assumption is under  
7 extenuating circumstances like that, they were able to  
8 write it, because there simply was no other product  
9 there, but the potassium needs of the patient had to be  
10 met.

11 Q. So, that was a particular circumstance.

12 A. Yes, ma'am.

13 Q. But in the normal course of events, if a  
14 pharmacist receives a prescription written for K-Dur  
15 20, he can't substitute an 8 or a 10 tablet without  
16 contacting the physician or someone in the physician's  
17 office.

18 A. Yes, ma'am.

19 Q. If a prescription is written for a 20 mEq  
20 tablet, a pharmacist can't substitute a potassium  
21 chloride powder without physician authorization, can  
22 he?

23 A. That's correct.

24 Q. Is the same true of a potassium chloride  
25 effervescent tablet? In other words, if the pharmacist

1 gets a prescription written for K-Dur 20, he can't  
2 substitute an effervescent tablet of potassium chloride  
3 without a physician's authorization.

4 A. You'd have to call the doctor's office, yes,  
5 ma'am.

6 Q. And if the pharmacist, again, has this  
7 prescription for K-Dur 20, he can't substitute a liquid  
8 form of potassium chloride for the K-Dur 20 without  
9 physician authorization, correct?

10 A. As long as the prescription's written for K-Dur  
11 and not open, you're right.

12 Q. So, this step of getting the physician's  
13 authorization is going to take some pharmacist time,  
14 correct?

15 A. Yes.

16 Q. And that physician -- pharmacist's time has  
17 value, correct?

18 A. Yes, ma'am.

19 Q. So, it's also going to take the time of the  
20 physician or the person in the physician's office who  
21 receives the contact from the pharmacist.

22 A. Right. They're talking to each other during  
23 the day, and they'd have to pick up and respond, and  
24 the pharmacist would need to call, yes.

25 Q. So, that would take additional time for someone

1 in the physician's office to deal with this  
2 authorization.

3 A. Yes, although they do have people that do that  
4 all day long.

5 Q. In planning for the marketing of your Klor Con  
6 M20, Upsher was planning to take sales directly from  
7 Schering's K-Dur 20, was it not?

8 A. In planning our -- I'm sorry, will you repeat  
9 the question?

10 Q. Sure.

11 When Upsher was planning the marketing of its  
12 Klor Con M20 --

13 A. Yes.

14 Q. -- the generic of Schering's K-Dur --

15 A. Yes.

16 Q. -- you were planning that your generic would  
17 take sales directly from K-Dur 20, were you not?

18 A. Yes, among other potassiums, but yes.

19 Q. Again, in planning the marketing of your Klor  
20 Con M20, Upsher anticipated that there would be rapid  
21 generic penetration, did it not?

22 A. Yes.

23 Q. Was Upsher assuming for planning purposes that  
24 your product would be priced at about 50 percent of  
25 K-Dur 20's price?

1           A. Well, depending on what pricing reference, I  
2 think if we were looking at the AWP, that was the price  
3 point reference we used, about 50 percent.

4           Q. If we looked -- well, let me back up.

5                   Does WAC or wholesale acquisition cost have a  
6 meaning to you?

7           A. Yes.

8           Q. If we looked instead of at AWP at WAC, what was  
9 Upsher planning with respect to its WAC price of your  
10 generic in comparison to the K-Dur 20 price?

11          A. So, just so I understand the question, you're  
12 not asking what people would pay; you're just asking me  
13 what the price comparison that we would advertise, for  
14 example.

15          Q. Right.

16          A. Okay, it's a good question. On the WAC, I  
17 thought when we came out, we were going to price it  
18 about 30 to 40 percent off WAC, again with the caveat  
19 that I don't know what they're actually paying for  
20 K-Dur, and WAC doesn't represent what they actually pay  
21 for our product either, and it -- certainly every  
22 segment pays -- has different arrangements with K-Dur  
23 and Upsher-Smith. So, as a reference point, I thought  
24 it was about 30 or 40 percent off WAC when we first  
25 came out.

1 Q. And that was in September of 2001?

2 A. Yes, ma'am.

3 Q. How about when you were planning ahead for the  
4 marketing of your Klor Con M20, what were you  
5 anticipating your WAC would be in relation to K-Dur 20?

6 A. Well, we put in a number of different  
7 scenarios. We could have put -- in fact, I think we  
8 did put, for example, a 50 percent price. As I  
9 mentioned earlier today, I think, when I came back and  
10 discovered some of the arrangements that Schering had  
11 that we just didn't realize with regard to some of  
12 their customers, we thought, well, we'll have to  
13 rethink our pricing assumptions, we'll have to rethink  
14 our share assumptions.

15 So, there would have been a number of different  
16 scenarios ranging from, you know, gee, we'll offer this  
17 as a low-cost alternative, maybe 20 percent off theirs,  
18 to perhaps 50 percent off and be very aggressive and  
19 assertive. We were driving to change prescriptions,  
20 and so we wanted to come on strong.

21 Q. When you had to rethink your market share and  
22 pricing, were you thinking about maybe discounting even  
23 more than 50 percent off of WAC of K-Dur 20?

24 A. Well, no, and let me explain the reason why.  
25 We don't have the resources they do, and, for example,

1 Pacificare today is a managed care plan that I think I  
2 mentioned that uses K-Dur. There's no way I can  
3 compete. There's no amount of discount that I could  
4 offer that would get them to start using Klor Con  
5 instead of K-Dur, because we just don't have the  
6 breadth of products, we just don't have those -- when I  
7 say we had to go back and look at it, we had to start  
8 saying, is this realistic?

9 And part of that answer might be, do we really  
10 need to discount it that much? If it's not going to  
11 get us the business, if we can't get into that share,  
12 why would we discount it that much? Perhaps we can do  
13 less of a discount, but we can redirect our sales  
14 objectives.

15 Q. Okay. So, in planning, you were thinking about  
16 a discount of 20 to 50 percent compared to the WAC of  
17 K-Dur 20, right?

18 A. Yes, ma'am.

19 Q. But you actually wound up selling at a WAC that  
20 was 35 to 45 percent below K-Dur 20?

21 A. Yes, ma'am, as I recall, that was it.

22 Q. Since 1996, the 20 milliequivalent tablet  
23 segment has grown, has it not?

24 A. Yes, the -- it's grown at the expense of the 8  
25 and 10.



1           Q. So, that's a larger -- well, let me start  
2 again.

3           In 1996, it was a smaller market than, say, in  
4 1999.

5           A. Yes, ma'am.

6           Q. Was it in approximately January 1999 that you  
7 personally learned that Upsher would have the 180-day  
8 exclusivity for Klor Con M20?

9           A. That was about the time, yes.

10          Q. So, after January 1999, knowing that you would  
11 have the exclusivity, your forecasts of Upsher's market  
12 share for the 20 mEq segment increased, did they not?

13          A. Well, again, I -- they went up, they went down,  
14 they increased during that time period. After I came  
15 back from our customers, they went from 50 percent  
16 share down to 35 percent share. That was almost --  
17 well, that was a year -- wasn't it, a year and a half  
18 before we actually went to market. So, there would  
19 have been -- I didn't have one share assumption, in  
20 other words. It went up and it went down.

21          Q. But at least after you learned of the 180 days,  
22 you weren't forecasting that in that initial six months  
23 you'd have competition from other generics other than,  
24 perhaps, Warrick.

25          A. Warrick and our own private label, so we

1       figured there would be four in the market.

2               MS. BOKAT: Your Honor, may I approach the  
3       witness, please?

4               JUDGE CHAPPELL: Yes, you may.

5               MS. BOKAT: I'm going to hand you CX 21, which  
6       we have up on the computer.

7               JUDGE CHAPPELL: Okay.

8               BY MS. BOKAT:

9               Q. Mr. Dritsas, CX 21 is a series of marketing  
10       two-pagers. Is that right?

11              A. Yes.

12              Q. Were these prepared in your department?

13              A. Yes.

14              Q. Would you turn, please, to the page that's  
15       numbered 12832.

16              A. Yes.

17              Q. This was prepared by Ms. Dolan, was it not?

18              A. Yes.

19              Q. And it appears to be dated July 1997. Is that  
20       right?

21              A. Oh, yes.

22              Q. You don't have any reason to think that that  
23       date's inaccurate.

24              A. No.

25              Q. Ms. Dolan shows a series of launch dates on

1 this page.

2 A. Yes.

3 Q. One of them is for commercial launch, and that  
4 shows -- this is -- I'm sorry, let me back up.

5 She's talking on this page about your Klor Con  
6 M20, correct?

7 A. That's correct.

8 Q. And she has a planned commercial launch date  
9 there of October 1st, 1997, right?

10 A. Yes.

11 Q. And then under the column Revised, it says,  
12 "TBD," to be determined?

13 A. Yes.

14 Q. Was that going to have to be revised because of  
15 the agreement with Schering-Plough?

16 A. Well, actually, it was going to have to be  
17 revised because we didn't have enough information to  
18 really have an accurate launch date. I don't think in  
19 July of 1997, for example, we had an approval on the  
20 product. So, while you can try and count on when the  
21 FDA will give you an approval and you can do everything  
22 you can, you really can't count on -- we have no  
23 control over that.

24 Q. But you had tentative approval as of that date,  
25 right?

1 A. Yes, ma'am.

2 Q. Looking under the heading Product Rationale,  
3 still on that same page.

4 A. Yes.

5 Q. There's a sentence that reads, "Klor Con M20  
6 tablets are potassium chloride extended-release tablets  
7 that are therapeutically and fully substitutable for  
8 K-Dur 20."

9 A. Yes.

10 Q. Was Ms. Dolan in essence saying that Klor Con  
11 M20 would be A-B rated to K-Dur 20?

12 A. That was our assumption.

13 Q. And that turned out to be accurate, right?

14 A. Absolutely.

15 MS. BOKAT: May I approach the witness, Your  
16 Honor?

17 JUDGE CHAPPELL: Yes, you may.

18 BY MS. BOKAT:

19 Q. Mr. Dritsas, I hand you CX 255.

20 A. Yes.

21 Q. Which looks like it's up on the computer  
22 monitor.

23 Do you feel like you're being inundated with  
24 paper? Would you like me to move --

25 A. If you wouldn't mind, thank you.

1 MS. BOKAT: Your Honor, could I put this on the  
2 end of the Bench in case we need to revert to some of  
3 these exhibits if I promise to remove them by the end  
4 of the day?

5 JUDGE CHAPPELL: Yes, you may. It looks like  
6 there's a spare binder there. He may need that on  
7 redirect, though.

8 MS. BOKAT: Right, and that's not mine, so I  
9 won't touch that one.

10 BY MS. BOKAT:

11 Q. Mr. Dritsas, can you tell me what CX 255 is,  
12 please?

13 A. Can I look at it for just a moment?

14 Q. By all means.

15 A. (Document review.) This is a compilation of  
16 updates on the Klor Con M project. So, this would come  
17 from the project team.

18 Q. To whom did the project team distribute these  
19 updates?

20 A. Well, amongst themselves and through the  
21 managers, they would have received them all the time.  
22 I believe at least quarterly, though, the upper  
23 management group would also receive them, and we would  
24 actually have a meeting where we would go through them.

25 Q. Were you part of that upper management team

1       that received these quarterly?

2           A.   Yes.

3           Q.   Looking at the first page of CX 255, which is  
4       numbered 02611, that shows March 6th, 1997 as the date  
5       of tentative approval of Klor Con M20 from the FDA. Is  
6       that right?

7           A.   It just takes me a while to find these. Okay,  
8       tell me again, please.

9           Q.   Okay, I think this is about the third or fourth  
10      date from the bottom.

11          A.   Okay.

12          Q.   Does that show March 6th, 1997 as the date of  
13      FDA tentative approval for Klor Con M20?

14          A.   March 6th did you say?

15          Q.   Yes, sir.

16          A.   Yes. Actually, not tentative approval. It  
17      says, "approvable status." I don't know if that's  
18      tentative or approval.

19          Q.   This shows a target market introduction of  
20      August 1997, does it not?

21          A.   Yes.

22          Q.   That's based on the assumption of a successful  
23      jury trial starting in July of 1997?

24          A.   Assumes a successful jury trial, yes. We -- my  
25      understanding is we didn't go to a jury trial, but

1       that's the assumption that's in here.

2           Q.   The patent litigation was scheduled for trial  
3   on June 17th or 18th of 1997, wasn't it?

4           A.   Yes.  I just didn't know it was going to be in  
5   front of a jury or a judge.  I -- these -- apparently  
6   these people thought it would be a jury.

7           Q.   So, they were assuming that if it went to trial  
8   and it was successful for Upsher, they would launch in  
9   August of 1997.

10          A.   Well, what they're saying in here, just a  
11   minute, please, target market introduction -- all of  
12   these, and I don't know if this is a good example, if  
13   you see it in other things, but typically what you'll  
14   see here is a template.  It shows you your plan, it  
15   shows you your target, and then it shows you your  
16   actual.

17                So, for example, in the template, they might  
18   say we assume that the FDA will approve it at this  
19   time.  They may or may not.  They assume that the  
20   jury's in.  The dates in here may change, but the  
21   template is there, and the team will continue to put in  
22   dates and will continue to work so that we don't just  
23   stop.

24          Q.   Now, I think maybe we do have an example if we  
25   look at the page numbered 02617.

1 A. Okay, let me find that. Yes.

2 Q. This was prepared on November 12th, 1996.

3 A. Yes.

4 Q. So, it's earlier than the page -- first page we  
5 looked at, which was March 12th, 1997.

6 A. Yes.

7 Q. And here, if we look at the second date from  
8 the bottom, we see a target market introduction for  
9 Klor Con M20 of April 1st, 1997, right?

10 A. Right. So, in between this meeting and the  
11 following one, the date had moved from 4/1/97 to 8/97  
12 and so on. It might just continue to slide out.

13 Q. So, as of November 12th, 1996, there was a  
14 target date of April 1st, 1997, assuming summary  
15 judgment by October of '96, right?

16 A. Yes.

17 Q. And also assuming a rapid review.

18 A. I'm sorry?

19 Q. Also assuming a rapid review on appeal.

20 A. Yes, that's what it says, a rapid review.

21 The people who write this, by the way, are --  
22 and are on the teams are not the top management people.  
23 These are our team members. So, if you do see  
24 inconsistencies, for example, if it says it was going  
25 to be a jury but it really wasn't, if it says the



1 summary judgment was going to be very quick, they're  
2 not the upper management people who potentially would  
3 have had more knowledge on that, and in our company,  
4 that knowledge isn't always passed along unless it's  
5 deemed necessary for something. So, if you see those  
6 inconsistencies, just keep in mind that the people who  
7 are doing this didn't always have access to that  
8 information.

9 Q. But the people doing this were the members of  
10 the project team responsible for the launch of the  
11 product.

12 A. These people were not part of the launch team,  
13 no, ma'am. This is the development team. Two very  
14 different teams.

15 Q. Do you recall, sir, back in the spring of 1997  
16 how many Klor Con M20 tablets Upsher figured they would  
17 need for the launch?

18 A. I don't remember at all. I'm sorry.

19 MS. BOKAT: Your Honor, may I approach the  
20 witness, please?

21 JUDGE CHAPPELL: Yes.

22 MS. BOKAT: Mr. Dritsas, I show you an exhibit  
23 that has been numbered CX 256, which I think we have on  
24 the computer.

25 JUDGE CHAPPELL: Yes, we do, thank you.

1 BY MS. BOKAT:

2 Q. Mr. Dritsas, these are notes from a meeting on  
3 Klor Con M20, correct?

4 A. Apparently, yes.

5 Q. And that meeting was held on April 29th, 1997?

6 A. Yes.

7 Q. If you look at the second page numbered 06737.

8 A. Yes.

9 Q. The fourth point down in the second sentence  
10 reads, "Ball park launch quantities equal 28.2 million  
11 tablets."

12 Does that refresh your recollection on what  
13 Upsher was planning in terms of the number of tablets  
14 it would need for launch?

15 A. I'm afraid it doesn't. First of all, I just  
16 want to point out, I've never seen this. This isn't  
17 something that would come to me. And again, for  
18 example, it says there will be no additional sales  
19 expenditures prior to the launch. I'm not exactly sure  
20 how we could launch a product without putting  
21 expenditures towards that.

22 It has in here a ballpark estimate, but the  
23 launch team is responsible for those estimates. This  
24 is a development team. So, it's out of context to me.  
25 I don't know if they're referring to ballpark launch

1 quantities for regulatory purposes, if there's some  
2 amount that they need to do, but a launch quantity  
3 would clearly come from a launch team. That's  
4 consistent with every product launch we do. It goes  
5 from a development team to a launch team.

6 Q. So, this doesn't refresh your recollection?

7 A. This has no meaning to me.

8 JUDGE CHAPPELL: Ms. Bokat, it's after 4:00.  
9 Let me know when you are at a good breaking point.

10 MS. BOKAT: This is a fine breaking point, Your  
11 Honor.

12 JUDGE CHAPPELL: Let's take our afternoon  
13 recess. I have to handle a procedural matter. So, we  
14 will take a recess and return at 4:20.

15 (A brief recess was taken.)

16 JUDGE CHAPPELL: Ms. Bokat, you may proceed.

17 MS. BOKAT: Thank you.

18 May I approach the witness, Your Honor? May I  
19 approach the witness, please?

20 JUDGE CHAPPELL: Yes, you may. I'm sorry, I  
21 couldn't hear you over the creaking door.

22 MS. BOKAT: The acoustics in this room are  
23 terrible.

24 JUDGE CHAPPELL: Well, the sound from the door  
25 carries very well.

1 MS. BOKAT: And earlier in the day, Mr. Gidley  
2 was sitting at the back, and I could hear what he was  
3 saying up here.

4 JUDGE CHAPPELL: Oh, did you tell him that?

5 MS. BOKAT: I did, I was honest.

6 MR. CURRAN: After about 18 minutes.

7 JUDGE CHAPPELL: I was going to say, maybe Mr.  
8 Curran was throwing his voice.

9 MS. BOKAT: I believe we have CX 265 on the  
10 computer.

11 JUDGE CHAPPELL: Good thing it's not a criminal  
12 trial, depending on what you heard Mr. Gidley say, of  
13 course.

14 BY MS. BOKAT:

15 Q. Mr. Dritsas, CX 265, is that another of the  
16 monthly updates from the project team?

17 A. Yes.

18 Q. That shows a targeted market introduction date  
19 for Klor Con M20 of September to November 1997, does it  
20 not?

21 A. Yes. Now they're providing a range. And in  
22 here, I don't know that they have any legal knowledge  
23 on how long it takes to do an appeal, but they've put  
24 in -- they figure within two to four months, the appeal  
25 will be done.

1 Q. So, once the appeal was done, Upsher would  
2 launch Klor Con M20?

3 A. Well, predicating -- yes, assuming that we got  
4 the approval, of course, and then assuming that we were  
5 able to get all the equipment and everything else we  
6 needed to gear up for it and we got our sales and  
7 marketing launch team, then we would launch, but those  
8 things would have to happen in order for us to launch.

9 Q. I'm going to ask you to think back to spring of  
10 1997. At that time, Upsher expected that once you  
11 launched your generic of K-Dur 20, Warrick would also  
12 bring a generic of K-Dur 20 to market, didn't you?

13 A. Yes, that was one of the scenarios.

14 MS. BOKAT: Your Honor, may I approach the  
15 witness, please?

16 JUDGE CHAPPELL: Yes, you may. And it is now  
17 79 degrees in here. If anyone wants to open the  
18 windows, feel free.

19 BY MS. BOKAT:

20 Q. Mr. Dritsas, I hand you CX 24.

21 A. (Document review.) Yes.

22 Q. Your marketing department prepares forecasts of  
23 products before they're launched, does it not?

24 A. Yes, our marketing department does.

25 Q. Looking at the second page of CX 24, which is

1       numbered 07397.

2           A.   Yes.

3           Q.   Is this one such forecast?

4           A.   Ah, yes, ma'am, this is -- this appears to be  
5       Klor Con M20 market -- this would be one of the models,  
6       yes.

7           Q.   In this model --

8           A.   Yes.

9           Q.   -- your department was using the assumption  
10       that Upsher's generic would have an average market  
11       share of 30 percent from September to December of 2001,  
12       correct?

13          A.   It probably is, let me just find it.

14          Q.   I'm looking still at the second page --

15          A.   Yes.

16          Q.   -- the second bullet point under Assumptions.

17          A.   Ah, yes, "USL average 30% share," yep.  It's --  
18       I'm sorry, yes.

19               JUDGE CHAPPELL:  Mr. Curran, while she's taking  
20       a break looking for a document, I don't mean to  
21       interrupt you, but before I forget, we had some witness  
22       who's available tomorrow and he needs to finish  
23       tomorrow.  Is that right?

24               MR. CURRAN:  Ideally, yes, Your Honor.

25               JUDGE CHAPPELL:  Okay, and is this witness

1 taking longer than you anticipated?

2 MR. CURRAN: Yes, Your Honor.

3 JUDGE CHAPPELL: I thought so. So, will we  
4 take that witness first in the morning?

5 MR. CURRAN: Well, I'm afraid that might be  
6 unfair to complaint counsel. We will confer at the  
7 conclusion of today and address scheduling issues.

8 JUDGE CHAPPELL: Okay, thank you, because I --  
9 if it happens, it happens, but I'd prefer not to be in  
10 a position where we have to go into the night tomorrow  
11 night.

12 MR. CURRAN: Agreed.

13 JUDGE CHAPPELL: Okay, thank you.

14 MR. CURRAN: Thank you.

15 JUDGE CHAPPELL: Sorry, Ms. Bokat.

16 MS. BOKAT: No problem, Your Honor.

17 May I approach the witness?

18 JUDGE CHAPPELL: Yes, you may.

19 BY MS. BOKAT:

20 Q. Mr. Dritsas, I hand you CX 138.

21 A. (Document review.) Yes, ma'am.

22 Q. Is CX 138 another forecast prepared by your  
23 department?

24 A. Yes, these -- this is another model.

25 Q. If we look at the first page of CX 138 --

1 A. Yes.

2 Q. -- there's a table on the left.

3 A. Yes.

4 Q. That's a forecast done in units, correct?

5 A. Yes, "Klor Con M20, September Launch With  
6 Private Label and Warrick (Units)."

7 Q. What time period is covered by that forecast?

8 A. Well, let me look. September -- okay, June  
9 through December.

10 Q. I'm sorry?

11 A. It says K-Dur -- oh, I'm sorry, it's without  
12 entry from June to December. I -- it's not clear to me  
13 what time period this is. It has the 20 mEq market,  
14 then a generic entry on 9/1. The K-Dur tablets without  
15 a generic entry during June through December, so that  
16 would assume that K-Dur in this case does not give  
17 their product to Warrick, that would be an assumption.

18 The next line says K-Dur 20 tablets for  
19 September through December, and that is a scenario  
20 where they do give it to Warrick from September through  
21 December. Then the M20 tablet from September through  
22 December, which would include a pipeline. And it also  
23 includes us having our private label partner, who as we  
24 know is Qualitest, through September through December.

25 So, you would have a scenario where there are



1 at least three, K-Dur, Upsher-Smith as well as Warrick,  
2 and without Warrick, or K-Dur, Upsher-Smith and  
3 Qualitest without Warrick. And then you have another  
4 scenario where all four are there.

5 Q. This line that says, "K-Dur 20 tabs without  
6 generic entry for June-December," was that based on the  
7 assumption that there would be no generic entry in that  
8 six-month time period?

9 A. Well, what we're doing in here is trying to  
10 look at all the possible scenarios. So, the one you're  
11 referring to would say, well, what if they don't give  
12 it to Warrick? The others would say, well, what if  
13 they do? Because we -- we have to run out the models  
14 with each scenario just in case.

15 Q. So, if it's not given to Warrick, then for  
16 September to December, you were forecasting that K-Dur  
17 would have a 35 percent market share?

18 A. You know, ma'am, it's not clear from this,  
19 because it says, "K-Dur tablets," but then below it  
20 there's a market share for Warrick that says 15  
21 percent. So, the graph itself is somewhat confusing to  
22 me.

23 MR. GIDLEY: Excuse me, Your Honor, Ms. Bokat.  
24 I believe this document is an in camera document due to  
25 some figures that appear on it. If you want to use it

1 further, I'd like to go in camera, and it's -- I'm not  
2 the expert on this document, but my log here says that  
3 it is in camera, and I've conferred with my client  
4 about it.

5 MS. BOKAT: I apologize.

6 JUDGE CHAPPELL: Okay, and you intend to  
7 question on this document?

8 MS. BOKAT: Yes, I do.

9 JUDGE CHAPPELL: Okay, I will have to ask the  
10 public to leave the courtroom for an in camera session,  
11 and you will be notified when we go back into public  
12 session. Thank you. You need to pull that off the  
13 screen until the courtroom's clear. Thank you.

14 (The in camera testimony continued in Volume  
15 20, Part 2, Pages 4918 through 4924, then resumed as  
16 follows.)

17 BY MS. BOKAT:

18 Q. Mr. Dritsas, the next document I'm going to ask  
19 you about is actually an Upsher exhibit. It was in tab  
20 10 of your first binder, which might be easier for you  
21 to read than the screen.

22 A. Yeah, thank you, I think it would be.

23 JUDGE CHAPPELL: Does he have the right volume  
24 there? Is it the thick one?

25 MS. BOKAT: It's the big fat one.

1 THE WITNESS: Thank you, yes.

2 BY MS. BOKAT:

3 Q. Do you have tab 10?

4 A. I do, thank you.

5 Q. I believe you were talking about this document  
6 with Mr. Gidley earlier in the day. This relates to  
7 Apothecon's pricing for their --

8 A. Yes.

9 Q. -- potassium chloride?

10 JUDGE CHAPPELL: Ms. Bokat, I think you might  
11 need to focus that for the benefit of the spectators on  
12 the ELMO, or maybe I'm the only one who can't read it.

13 THE WITNESS: It is fuzzy.

14 JUDGE CHAPPELL: That's better, thank you.

15 BY MS. BOKAT:

16 Q. So, the e-mail is about Apothecon's pricing of  
17 their potassium chloride?

18 A. Yes.

19 Q. And I think you said earlier in the day that  
20 Apothecon was aggressive in its pricing.

21 A. Yes, and that's why I actually asked John to do  
22 this, to tell me how much effect they had had on the  
23 market.

24 Q. Despite Apothecon's aggressive pricing, K-Dur  
25 10's units had gone up 3 percent, had they not?

1           A. Yes.

2           Q. And K-Dur 10's dollars had gone up 3.5 percent?

3           A. I'm assuming that they're basing those dollars  
4 on average selling price, so, for example, K-Dur could  
5 sell into a market and actually be aggressive with  
6 their pricing, they could sell for less, they could  
7 even compromise on some of their margin, but you  
8 wouldn't see any of those in the average selling price  
9 calculation. So, what this tells me is that K-Dur 10  
10 is competing and going up in a market where there's  
11 heavy generic competition, and from my findings and  
12 going out in the field, it would indicate that they're  
13 probably cutting some deals that would be extremely  
14 profitable and would make it -- them in a position to  
15 retain or even grow market share.

16           There's no way we could ascertain that from  
17 getting the average selling price, because you don't  
18 really know what customers are paying with an average  
19 selling price, as I mentioned earlier.

20           Q. But based on this exhibit --

21           MR. GIDLEY: Your Honor -- excuse me, Ms.  
22 Bokat. I object not to the prior question but the  
23 question before has been transcribed as the K-Dur 10  
24 units going up 3 percent and the document says 0.3  
25 percent, at least on my screen.

1 MS. BOKAT: You're right, I misspoke, it is 0.3  
2 percent.

3 JUDGE CHAPPELL: Okay.

4 THE WITNESS: I didn't catch that either.

5 BY MS. BOKAT:

6 Q. So, according to this document, K-Dur 10's  
7 units and dollars were both increasing despite  
8 Apothecon's pricing, if you look at this document.

9 A. If you look at this document, they are  
10 competing very well against that company.

11 Q. You mentioned earlier in the day that in  
12 September of 2001, Upsher actually delivered I believe  
13 it was \$28 million worth of the Klor Con M20?

14 A. Yes, ma'am.

15 Q. And then you mentioned that today it's over \$60  
16 million.

17 A. Yes.

18 Q. And I wasn't clear when you said "today," are  
19 you talking about a particular month?

20 A. No, ma'am, I was talking about September  
21 through -- I don't recall if the question was through  
22 year-end, but roughly how much had we sold of this  
23 product. So, we sold \$28 million, and then if you look  
24 at what the sales are of that since we launched the  
25 product, I was estimating around \$60 million.

1 Q. And that would be from September through when?

2 A. Now.

3 Q. You talked at some length with Mr. Gidley  
4 earlier about the savings that could be achieved by  
5 using two of your 10s, the old Klor Con 10s, versus  
6 K-Dur 20.

7 A. Yes.

8 Q. And I believe you talked about 56 percent  
9 savings?

10 A. In some cases. Again, the complication in this  
11 is that there's not one price to one class, so that  
12 would be one target point that we would use.

13 Q. But at that target point, if you're talking  
14 about 56 percent savings, you're not comparing one Klor  
15 Con 10 to one K-Dur 10 -- 20, right?

16 A. No, we'd be comparing the dose. If it was 20  
17 mEqs a day or 40 mEqs a day, we would -- probably 20  
18 mEqs a day, we would be comparing it that way. So, it  
19 was two 10s.

20 Q. So, if we looked at 20 milliequivalents and we  
21 compared the price of K-Dur 20 and Klor Con 10, there  
22 was still a substantial premium in the K-Dur 20 price  
23 above your Klor Con 10.

24 A. Right, depending again on -- the only caveat  
25 being depending on the customer. For Pacificare, for

1     example, they actually listed it as a generic. So, you  
2     would have to spend more money to get Klor Con if you  
3     were on that plan, and that's one of the largest plans  
4     in the country.

5           Q. But, for example, those marketing pieces that  
6     went to physicians that showed all the little coins and  
7     the 56 percent --

8           A. Yes, yeah.

9           Q. -- that's a substantial price premium for K-Dur  
10    20 compared to Klor Con 10.

11          A. Yes, it would be.

12          Q. You talked earlier in the day about actually  
13    making some sales calls, and I think you had made some  
14    of them as well as people who worked for you. When you  
15    did that, were you going from Minnesota into other  
16    states to visit customers?

17          A. Yes, ma'am.

18          Q. Some of the salespeople who accompanied you on  
19    those visits, were they out of Upsher's offices in  
20    Minnesota?

21          A. Yes. Actually, on my calls, there was only one  
22    gentleman, Tom Burke.

23          Q. Does Mr. Burke have offices in Minnesota?

24          A. Yes, ma'am.

25          Q. So, you were both going across state lines to

1 make those visits to customers.

2 A. Yes, ma'am.

3 Q. You also talked about selling your Upsher  
4 products to wholesalers' DCs or distribution centers.

5 A. Right.

6 Q. Are those distribution centers spread around  
7 the United States?

8 A. Yes.

9 Q. So, Upsher would be shipping product from your  
10 facilities in Minnesota to distribution centers in  
11 other states?

12 A. Yes, ma'am.

13 Q. Would you be willing to look back at the skinny  
14 white binder?

15 A. I'd be willing to look back at anything.

16 Q. I'm looking at tab 23.

17 A. Okay, yes. This is the Prevalite?

18 Q. Right, this is USX 660.

19 A. Yes.

20 Q. It's about Prevalite, and I'm going to see if I  
21 can put the first page on the ELMO. Rachel, I want to  
22 focus on that sentence.

23 There's a sentence that reads, I believe it's  
24 the third sentence, "Initial stocking in the  
25 wholesalers was extremely successful while pull through



1 to the pharmacies has been a challenge."

2 What's the reference to "pull through to the  
3 pharmacies"?

4 A. The pull through to the pharmacies is to --  
5 when you get into a wholesale program, for example, it  
6 goes from the wholesaler into the pharmacy. That's the  
7 pull through part of it.

8 Q. So, was Upsher having success getting Prevalite  
9 into the wholesalers?

10 A. Yes, ma'am.

11 Q. But did you have a challenge trying to get the  
12 product from the wholesaler into the retail pharmacy?

13 A. Well, 63 percent of the pharmacies were using  
14 it, so I -- we were obviously overcoming that, but we  
15 learned a lot of things about how to do that. Part of  
16 the issue here that they're referencing is that in  
17 First Databank, they had separate item numbers, so they  
18 weren't automatically pulled. What we had hoped for  
19 was every time a pharmacist would pull up -- get a  
20 prescription for Questran in can, that the item numbers  
21 to that in First Databank would match our packet.  
22 Well, in fact, they didn't. So, we had to call them  
23 and tell them, this is how you get it, this is what you  
24 do, they are not going to automatically -- now, they  
25 would for the packets. The packets to packets would

1 just automatically link, but they wouldn't in the cans,  
2 and that was a challenge.

3 Q. Was there any problem with the taste of  
4 Prevalite?

5 A. Bile acid sequestrants don't taste good, and I  
6 just want to preface it with that. You can try them  
7 sometime if you like --

8 Q. No, thank you, sir, I hope not to have to.

9 A. -- but they taste like sand. The biggest thing  
10 we found with Questran was patients complained about  
11 flavor fatigue, which is after they took it for a long  
12 period of time, because it's very sweet, it's very  
13 gritty, they just didn't like it anymore, they would  
14 stop taking it. Doctors and pharmacists would say they  
15 wouldn't be compliant. Our formulation was not sweet  
16 at all.

17 Now, some of the patients then would complain  
18 and say, gee, I've been used to taking this really  
19 sweet, orangy product, yours isn't like that. And we  
20 would say, well, flavor fatigue is an issue. It's our  
21 personal belief that -- and that's how we marketed the  
22 product -- that it mixes better with a variety of  
23 juices. So, rather than take orange sand in water for  
24 the rest of your life, you can take orange sand on  
25 Monday, cranberry sand on Tuesday, pineapple sand on

1 Thursday, because there is no competing taste.

2 Now, in answer to your question, did some  
3 people complain about the taste of that? Yes. I'm not  
4 aware of a cholestyramine where they don't complain  
5 about the taste.

6 Q. But your product didn't even taste sweet?

7 A. Our product did have aspartame, so it was  
8 sweetened, but it was formulated to not have an  
9 overpowering sweet taste to it, because that conflicts  
10 with some of the flavors you might want to mix it in.

11 Q. I believe you testified that the Klor Con M20  
12 that Qualitest is selling actually is manufactured by  
13 Upsher-Smith, right?

14 A. Yes, ma'am.

15 Q. Does Upsher then ship the product to Qualitest?

16 A. Yes, ma'am.

17 Q. Do you know where you ship the test -- the  
18 product to Qualitest?

19 A. You know, I -- I don't. Qualitest's  
20 headquarters I think is in Alabama, so I really don't  
21 know their shipping destination. I'm sorry.

22 Q. Do you ship to their warehouse as opposed to  
23 their headquarters?

24 A. They might be one in the same. I don't know.

25 Q. But as far as you know, they're located outside

1 Minnesota?

2 A. Yes, ma'am.

3 Q. I'm going to switch focus for a few minutes to  
4 Niacor.

5 A. Okay.

6 MS. BOKAT: Your Honor, may I approach the  
7 witness, please?

8 JUDGE CHAPPELL: Yes, you may.

9 BY MS. BOKAT:

10 Q. Mr. Dritsas, I hand you CX 929, which Ms.  
11 Hertzman has up on the computer.

12 A. Okay. (Document review.)

13 Q. What is CX 929?

14 A. This is the Niacor-SR tablet marketing update,  
15 it would have to be, it's in March of 1997. So, it's a  
16 report, in other words, on this. It was done by Denise  
17 Dolan, who is not the niacin marketing person, which is  
18 a little curious, but...

19 Q. In March of 1997, was Ms. Dolan working in your  
20 department?

21 A. Yes.

22 Q. Would you turn, please, to the page numbered  
23 13139.

24 A. Yes.

25 Q. I'm looking at the first paragraph, the top of

1 the page, after the number 1.

2 A. The first paragraph on the top of the page,  
3 yes.

4 Q. And the first sentence, Ms. Dolan reports,  
5 "Hepatotoxicity is perceived as a significant problem  
6 with all sustained-release niacin preparations."

7 Was that her belief at that time?

8 A. Yes, that was a perception that was common  
9 among physicians at that time.

10 Q. And had that perception been reinforced by an  
11 article in J-A-M-A?

12 A. Yes -- well, yes.

13 Q. Is that publication sometimes called JAMA?

14 A. It is, ma'am.

15 Q. Is -- what does JAMA stand for?

16 A. Journal of American Medical Association.

17 Q. So, that's a medical journal?

18 A. Yes, ma'am.

19 Q. Is that a highly regarded medical journal?

20 A. Oh, yes, ma'am.

21 Q. Upsher-Smith did some market research with  
22 physicians on their perceptions of niacin therapy, did  
23 you not?

24 A. Yes.

25 Q. And that research was done with cardiologists?

1           A. Well, which research are you referring to?

2           Q. Well, let me try it another way.

3                   Did Upsher hire a company called MedProbe, M E  
4   D, capital P R O B E, to perform some research on  
5   niacin?

6           A. Yes, ma'am.

7           Q. So, that's the research I'm asking about.

8           A. Yes, there were cardiologists. I thought I  
9   recalled IMs and some GPs in there as well.

10          Q. I'm sorry, IMs?

11          A. Internal medicine doctors, as well as GPs.  
12   That's my recollection.

13          Q. So, MedProbe did research with different types  
14   of physicians, cardiologists, internal medicine and  
15   general practitioners?

16          A. Yes, ma'am.

17          Q. That research was trying to measure physicians'  
18   perceptions of niacin, correct?

19          A. Yes. We commissioned them to find out what  
20   doctors think about niacin so that when we craft our  
21   message for it, we would know what to say.

22          Q. MedProbe wrote reports of its research, did it  
23   not?

24          A. Yes.

25          Q. I'm going to show you two documents, if His

1 Honor will let me approach.

2 JUDGE CHAPPELL: Yes, you may.

3 BY MS. BOKAT:

4 Q. These are both MedProbe reports, and just to  
5 save time, I'd like to hand them both to you at once,  
6 but if that gets confusing, let me know, and we will do  
7 it one by one.

8 A. Okay.

9 Q. For the purpose of the computer, I guess we  
10 better start with CX 991. So, I hand you 991, it's --  
11 I'm sorry, CX 991.

12 A. Okay.

13 Q. And CX 992.

14 A. Okay, thank you.

15 Q. Are CX 991 and 992 reports of the research that  
16 MedProbe did for Upsher-Smith on niacin?

17 A. Yes, ma'am.

18 Q. Would you turn, please, to the second page of  
19 CX 991, which bears the number 12978?

20 A. Yes.

21 Q. This is a report of research done with both  
22 cardiologists and primary care physicians, right?

23 A. I believe so, yes.

24 Q. Looking at the second to last paragraph on page  
25 2, the first sentence reads, "Most reportedly perceive

1     niacin to be relatively ineffective for controlling  
2     cholesterol levels because of patients' inability to  
3     tolerate the drug's side effects, (i.e., flushing) at  
4     therapeutic doses of the immediate-release form and/or  
5     perceive the incidence of hepatotoxicity from the  
6     sustained-release niacin as too prevalent to warrant  
7     its use."

8             That was one of MedProbe's findings?

9             A. Absolutely, they found that doctors had that  
10     perception.

11            Q. And then looking at the next paragraph, the  
12     first sentence reads, "Virtually all of these  
13     respondents reported that a prescription  
14     sustained-release niacin product did not appear to have  
15     any advantage over the currently available OTC versions  
16     of the sustained-release niacin (e.g., Slo-Niacin)."

17            Another finding of the probe -- I'm sorry, of  
18     MedProbe?

19            A. That was another perception that doctors had,  
20     yes.

21            Q. And then there's a sentence that starts at the  
22     bottom of that page and carries over to 12979.

23            A. Yes.

24            Q. And it reads, "Participants generally noted  
25     that widespread use of this product would depend upon



1 studies demonstrating a lower incidence of flushing and  
2 hepatotoxicity than is seen for the currently available  
3 OTC form."

4 A. Yes.

5 Q. And that was another finding from MedProbe?

6 A. That was the doctors' opinions, yes.

7 Q. Would you be kind enough to turn now to the  
8 other exhibit, CX 992?

9 A. Yes.

10 Q. Is that also a report from MedProbe?

11 A. It is, yes.

12 Q. And that's a report of research that MedProbe  
13 did for Upsher-Smith on niacins?

14 A. Yes.

15 Q. This report is of research with primary care  
16 physicians, is it not?

17 A. I believe you're right, yes.

18 Q. Would you turn -- actually, I guess you already  
19 have, to page 12950, which is the second page?

20 A. You're right, I have.

21 Q. You're good, you're ahead of me.

22 For the purposes of the computer, I'm going to  
23 focus on the second to last paragraph on that page. Do  
24 you see the paragraph?

25 A. Yes.

1           Q. Okay. The second sentence reads, "Virtually  
2 none of these physicians saw an advantage to a  
3 prescription sustained-release niacin compared to the  
4 currently available over-the-counter niacin  
5 formulations in terms of either efficacy or cost to  
6 patients."

7           A. Yeah, now --

8           Q. That was one of the conclusions from MedProbe?

9           A. Right, not surprising at all. There were no  
10 pharmaceutical companies promoting to them whatsoever.

11          Q. The next sentence goes on to read, "Further, a  
12 number of respondents expressed concern that any  
13 sustained-release niacin may pose a significant risk  
14 for hepatotoxicity and would require studies  
15 demonstrating the product's safety before they would  
16 consider prescribing it for their patients with high  
17 cholesterol."

18                 So, that's another MedProbe finding from their  
19 research?

20          A. Right, and what they're referring to there is  
21 you would have to have a well-controlled clinical trial  
22 where you demonstrated safety, and the assumption is  
23 the FDA wouldn't approve a product that wasn't safe and  
24 effective, but what they're stating is we would need  
25 well-controlled clinical trials in order to feel

1 comfortable, you know, prescribing something like this.

2 Q. Were the physicians saying that they would want  
3 to see the results of those trials?

4 A. They would -- they had expressed concern and  
5 would require -- I don't know that this is saying the  
6 doctors would have to look at them. My experience in  
7 going through their -- this with doctors is some like  
8 to look at your clinical trials, your results of  
9 things. Some, just the fact that you've been approved,  
10 might ask you questions about it. So, what is your  
11 indication? And what was the incidence of dropout?  
12 What was the incidence of flushing? What was the  
13 incidence of hepatotoxicity?

14 So, for example, there's been retrospective  
15 studies that have been done with our Slo-Niacin where  
16 the incidence of hepatotoxicity is about 2 percent or  
17 less, which is relatively similar to the statins. Some  
18 doctors will say I just want to know that. Some will  
19 say, show me the studies. I want to see that. So,  
20 when we come out with this product at this time, this  
21 would tell us -- I would take some of these studies,  
22 take the information, I'd put it into a marketing  
23 format so that if the physician said, that's  
24 interesting, let me see what your clinical trials  
25 showed, then the rep would have that available so that

1       they could show the doctor.

2               So, this is -- this information from both of  
3       these are really invaluable marketing pieces, because  
4       you don't want to hear the good stuff. You don't want  
5       to talk to doctors and just say, oh, it's great, I'll  
6       use it, that's fine. You want to hear, why wouldn't  
7       you use it? Well, I wouldn't use it because it causes  
8       too much hepatotoxicity or because it's not effective.  
9       You want to hear all those things and then craft your  
10      message.

11              And what I recall in here, too, is I thought I  
12      remembered some of the doctors also saying that, you  
13      know, I suppose if a company got behind it and promoted  
14      it, it could be a good product, and we know that  
15      Niacor -- or excuse me, Kos' product, which is an  
16      extended release niacin, does about \$100 million. So,  
17      there are doctors out there who are willing to  
18      prescribe an extended release niacin for that, and at  
19      this time there was nothing on the market. In my  
20      opinion, they didn't have any real perceptions of -- or  
21      their perceptions were not real in terms of the  
22      benefit. So, it doesn't surprise me that they found  
23      this.

24              Q. Whew, that was a long answer.

25              A. It is.

1 Q. Let me see if I can get to a part of it.

2 A. Sure.

3 Q. So, you're saying physicians might ask to see  
4 the clinical results or they might ask questions about  
5 flushing, hepatotoxicity.

6 A. Absolutely.

7 Q. You and I talked earlier this afternoon about  
8 the WAC price of Klor Con M.

9 A. Klor Con, okay.

10 Q. Right, I'm sorry, I'm going to switch products.

11 A. No, that's okay.

12 Q. In September --

13 A. Yes.

14 Q. -- of 2001.

15 A. Yes.

16 Q. And I think you said the WAC price of Klor Con  
17 M20 was 35-40 percent below WAC for K-Dur.

18 What is it today?

19 A. The WAC is about the same today, I believe.

20 Q. Do you know how Qualitest's WAC price compares  
21 to K-Dur 20's?

22 A. I don't know offhand, no.

23 Q. Is Upsher-Smith currently working on any drugs  
24 for which it intends to file an NDA?

25 A. Yes.

1           Q. Is Upsher-Smith currently working on any  
2 products for which it intends to file an ANDA?

3           A. Yes.

4           Q. How many ANDA products is Upsher-Smith working  
5 on today?

6           A. I honestly don't know the number, and the  
7 reason is I'm on part of the therapeutic strategy team,  
8 so we have an ongoing list of ANDA opportunities, some  
9 of which move into the NPED phase, where we're  
10 analyzing them. From there they might move to a phase  
11 where they're in queue, so they might be the next  
12 project we pick. I don't know if it's two, I don't  
13 know if it's three. I don't know how many. I wouldn't  
14 be able to give you an honest answer or an accurate  
15 answer on that.

16           MR. GIDLEY: Your Honor, I want to make sure  
17 that this witness understands that we can go in camera  
18 if he is going to talk about any future NDA or ANDA  
19 opportunity. We're happy for him to give truthful  
20 answers under oath, but we are going to request, Your  
21 Honor, that we go in camera if we're getting into a  
22 very sensitive nature about any future potential drug  
23 or pipeline opportunity at Upsher-Smith.

24           JUDGE CHAPPELL: He's your witness. Do you  
25 want to ask him one question to make sure he understood

1       what you just said?

2               MR. GIDLEY: Did you hear what I just said, Mr.  
3       Dritsas?

4               THE WITNESS: Yes.

5               MR. GIDLEY: All right.

6               JUDGE CHAPPELL: Does he understand what --

7               MR. GIDLEY: Do you understand what I just  
8       said?

9               THE WITNESS: Okay, if I'm understanding right,  
10       if there are going to be further questions about what  
11       products we're working on specifically or  
12       opportunities, then I assume --

13              MR. GIDLEY: You need to let us know first so  
14       that we can ask the Judge to seal the courtroom.

15              THE WITNESS: Well, I don't know what's going  
16       to be asked, but I don't want to -- I would prefer not  
17       to answer that in public. That's highly confidential.  
18       This is not something I would share.

19              MR. GIDLEY: And I know this is confusing.  
20       We're asking you not to do it without letting us know  
21       that the question calls for that answer, and then at  
22       that point, would you let us all know? Do you  
23       understand?

24              THE WITNESS: I do. I got it now.

25              JUDGE CHAPPELL: Okay, Ms. Bokat, you may

1 continue.

2 MS. BOKAT: Thank you, Your Honor.

3 BY MS. BOKAT:

4 Q. Is Upsher-Smith constantly looking for ANDA  
5 opportunities?

6 A. We look for some ANDA opportunities, yes.

7 Q. Do you know how many drugs Upsher-Smith  
8 currently has in development for which it may file an  
9 NDA?

10 A. I don't know offhand, no.

11 Q. Do you have a ballpark number?

12 A. I don't know for sure. I would imagine it's  
13 small, less than three.

14 Q. You talked at several points earlier in the day  
15 about Upsher's products being lower cost alternatives  
16 for older people and for older people who may be taking  
17 or paying some portion of six or seven drugs. Klor Con  
18 M20 is a lower cost alternative to K-Dur 20, is it not?

19 A. Yes.

20 Q. But the market didn't have available that Klor  
21 Con M20 lower cost alternative until September 2001,  
22 did it?

23 A. No, that's why we promoted our two 10s as The  
24 Economical K.

25 MS. BOKAT: That concludes my cross, Your



1 Honor.

2 JUDGE CHAPPELL: Any redirect?

3 MR. GIDLEY: Yes, Your Honor.

4 REDIRECT EXAMINATION

5 BY MR. GIDLEY:

6 Q. Mr. Dritsas, let me put back on the ELMO --

7 let's see, do we have the ELMO off? Good, it's on.

8 I'm showing you what Ms. Bokas showed you, Mr.

9 Dritsas, which is CX 256, and I know it's moving  
10 around.

11 A. Okay, may I see the top of it, just to see what  
12 it's from? I saw a lot of things.

13 Q. Absolutely.

14 A. Oh, this was the meeting notes that I didn't  
15 attend and I didn't get a copy on, okay.

16 Q. Okay, Mr. Dritsas, my first question is, did  
17 you attend the meeting, sir?

18 A. No.

19 Q. All right. I have highlighted the language  
20 that says, "Launch date scenarios: 8/1/97 without an  
21 appeal; 10/1/97 with an appeal."

22 Do you see that?

23 A. Yes.

24 Q. Sir, did the personnel at Upsher-Smith have  
25 extensive experience with the timing of patent

1 infringement litigation in the 1997 time frame?

2 A. No, we had never done any type of litigation  
3 like that.

4 Q. Has patent infringement litigation been a  
5 common experience for the personnel at Upsher-Smith?

6 A. No, I'm not aware of any other litigation that  
7 we were ever involved in.

8 Q. Sir, you were at Upsher-Smith -- you have been  
9 at Upsher-Smith for some 19 years. Is that correct?

10 A. Nineteen years, yes.

11 Q. Sir, how does the Schering/Upsher-Smith patent  
12 infringement case compare with other litigations the  
13 company's had over that near two decades time period?

14 A. We've never had anything as extensive or  
15 costly.

16 Q. Would any of the people at this meeting know  
17 how long it would take to appeal a patent infringement  
18 case in U.S. Federal District Court?

19 A. No.

20 Q. Mr. Dritsas, I'm going to show you this  
21 document, Marketing Two Pagers, and you may still have  
22 it up there.

23 A. Can I --

24 Q. Yes, it's CX 21, sir.

25 A. I would really prefer to grab it, if I can, if

1       you will just give me a minute.

2           Q.   You bet.

3           A.   CX --

4           Q.   It's in your other stack.  It's kind of thick.

5           A.   This one?

6           Q.   It's the Marketing Two Pager, CX 21.

7           A.   Okay, just a moment, please.  CX 21, I have it.

8           Q.   All right.  May I direct your attention to page  
9   832, 12832.

10          A.   Yes.

11          Q.   Now, sir, this -- you were asked a series of  
12   questions about this document, but I want to go to a  
13   couple of passages you weren't asked about.

14               What's the approximate time frame in which Ms.  
15   Dolan had prepared this document, do you know?

16          A.   This is in July 1997, so it would have been  
17   approximately a month after the settlement.

18          Q.   Mr. Dritsas, I've highlighted a sentence in  
19   this document that says, "We plan to go after the 20  
20   mEq market aggressively, as we have in the past,  
21   capitalizing on our national account and telephone  
22   sales force."

23               Do you see that?

24          A.   Yes.

25          Q.   And sir, when it says "we" in that sentence, is

1       that Upsher-Smith?

2           A.   That's Upsher-Smith, yes.

3           Q.   And when it describes about going after the 20  
4       mEq market at this time period, is that going after  
5       K-Dur 20?

6           A.   Yes, that segment of the potassium market.

7           Q.   And when it says here, "as we have in the  
8       past," does that mean you've competed aggressively with  
9       K-Dur 20 prior to this date, sir?

10          A.   Yes, of course.

11          Q.   Down below it says, "Development cost to date  
12       equals \$3.4 million."

13               Do you see that?

14          A.   Yes.

15          Q.   Now, the actual product development between  
16       1989 and 1995 was how much, sir?

17          A.   \$1.3 million.

18          Q.   What were the legal fees from the '743 patent  
19       infringement litigation, according to this document?

20          A.   \$2.1 million.

21          Q.   Sir, at the top of the document, it says, under  
22       Key Dates, "Patent Exp/ANDA."

23               Do you see that?

24          A.   Yes.

25          Q.   It's highlighted on the ELMO.

1 A. Oh, yes, uh-huh.

2 Q. What was the expiration date for the Schering  
3 '743 patent?

4 A. 2006.

5 Q. If Upsher-Smith lost the patent infringement  
6 trial, when do consumers get the Klor Con M20 product?

7 MS. BOKAT: Objection, Your Honor. I don't  
8 think we have any foundation for this witness to offer  
9 that opinion.

10 MR. GIDLEY: Your Honor, she opened the door  
11 wide open. She can't examine the witness for almost an  
12 hour about launch scenarios and litigation and appeals,  
13 conclude her examination with a discussion of the  
14 launch date and the 2001 events, without being asked  
15 the other possible outcomes. It seems to me the door's  
16 wide open.

17 MS. BOKAT: It seems to me he's asking for a  
18 legal conclusion.

19 MR. GIDLEY: If Ms. Bokat wants to take -- I  
20 don't mean to try the Court's patience at this late  
21 hour, but if Ms. Bokat wants to say that people in the  
22 Upsher-Smith marketing department don't understand the  
23 way the courts work, we might accept that stipulation  
24 this afternoon, and I'll shorten my redirect if I have  
25 that stipulation.

1 JUDGE CHAPPELL: The objection is to  
2 foundation, and I'm going to sustain it to the  
3 extent -- I want a little -- I'd like to have a little  
4 basis of what his understanding is before he answers  
5 that question.

6 MR. GIDLEY: Very good, Your Honor.

7 BY MR. GIDLEY:

8 Q. Mr. Dritsas, do you have an understanding of  
9 what the possible outcomes were for the  
10 Schering/Upsher-Smith litigation in the first six  
11 months of 1997?

12 A. Yes.

13 Q. Did you have a general understanding that you  
14 might win or you might lose the lawsuit?

15 A. Yes. The general understanding I had is that  
16 we didn't have better than a 50 percent chance of  
17 winning.

18 Q. And sir, did you have an understanding about  
19 what might happen to the Klor Con M20 product launch if  
20 you lost the lawsuit?

21 A. Yes.

22 Q. And what was your understanding in the spring  
23 of 1997 if you lost the lawsuit in terms of the launch  
24 date for the M20 product?

25 A. My understanding is that we would not be able

1 to launch the product until patent expiry, which was  
2 2006.

3 JUDGE CHAPPELL: Sir, what did you say, patent  
4 what?

5 THE WITNESS: The expiration of the patent. I  
6 said "patent expiry."

7 JUDGE CHAPPELL: Thank you.

8 THE WITNESS: You're welcome.

9 BY MR. GIDLEY:

10 Q. Mr. Dritsas, could I ask you to pull out CX 255  
11 from your stack.

12 A. Yes. Do you know what it was?

13 Q. Yes, it's a document that looks like this  
14 (indicating), Klor Con M20.

15 A. Okay. CX 255 did you say?

16 Q. Yes, sir.

17 A. Yes, I have it.

18 Q. Let's start with the cover page, the top page,  
19 which is Bates numbers 2611.

20 A. Yes.

21 Q. All right. The author of this document says,  
22 "Assumes successful jury trial."

23 Do you see that?

24 A. Yes, I do.

25 Q. Was this case a jury trial case?

1 A. I later learned it wasn't.

2 Q. It was not a jury trial case?

3 A. That's what I was told.

4 Q. Let me direct your attention to page 616, and  
5 I've highlighted a sentence there, 616.

6 A. Yes.

7 Q. It says, "A summary judgment motion was filed  
8 the week of 10/28/96."

9 Do you see that?

10 A. Yes.

11 Q. Do you know what that means?

12 A. No, and I don't know that many people at  
13 Upsher-Smith would.

14 Q. Do you know whether if you won or lost that  
15 whether that would be good or bad for your case?

16 A. No, I don't.

17 Q. Do you know whether that would have disposed of  
18 the case?

19 A. No, I don't.

20 Q. Do you know whether there would have been an  
21 appeal or could have been an appeal from a summary  
22 judgment motion?

23 A. No, I don't know what a summary judgment motion  
24 is.

25 Q. But this document says it was filed 10/28/96,



1       that week?

2           A.   Yes.

3           Q.   Now, that prior document we were just looking  
4   at is dated November 12?

5           A.   Yes.

6           Q.   All right. Turn the page, sir.

7           A.   To which page?

8           Q.   Just the very next page, the page that's Bates  
9   labeled 617. Do you see that?

10          A.   Okay, yeah.

11          Q.   All right. That document at the top says,  
12   "November 12, 1996."

13          A.   Yes.

14          Q.   Okay. It says on the same day, "Assumes  
15   summary judgment by 10/96."

16                Do you see that?

17          A.   Yes.

18          Q.   Do you have any idea whether summary judgment  
19   could be granted as a practical matter within three or  
20   four days?

21          A.   I have no idea.

22          Q.   Now, sir, that's an assumption that summary  
23   judgment would be granted by 10/96, correct?

24          A.   Yes.

25          Q.   10/96 comes before November 12, 1996, does it

1 not?

2 A. Yes.

3 Q. Wouldn't we know whether we had actually  
4 achieved this assumption or not by the time this was  
5 written?

6 A. Yes. It's probably just something that was in  
7 earlier and they carried it over.

8 Q. So, this might actually be inaccurate or a  
9 glitch?

10 A. Right.

11 Q. Mr. Dritsas, I ask you to pull out from the  
12 stack CX 157.

13 A. CX 157, okay.

14 MR. GIDLEY: Excuse me, Your Honor, this may be  
15 in camera. I think we're going back to an in camera  
16 document. Mr. Malik?

17 JUDGE CHAPPELL: Mr. Gidley, you led us to  
18 believe you were the in camera man.

19 MR. GIDLEY: Obviously, Your Honor, Mr. Malik  
20 is the expert, and I am his humble servant.

21 MR. MALIK: Yes.

22 JUDGE CHAPPELL: Well, thank you for letting  
23 him stand.

24 MR. MALIK: Yes, Your Honor, it is an in camera  
25 document.

1 MR. GIDLEY: May we ask very briefly that the  
2 courtroom be cleared of non-Upsher personnel?

3 JUDGE CHAPPELL: Yes, at this point I will have  
4 to ask the public to leave while we go into an in  
5 camera session. Thank you.

6 (The in camera testimony continued in Volume  
7 20, Part 2, Pages 4925 through 4933, then resumed as  
8 follows.)

9 BY MR. GIDLEY:

10 Q. Mr. Dritsas, do you have CX 265?

11 A. Yes, I do.

12 Q. Do you have it in front of you?

13 A. Yes, I do.

14 Q. All right, on the ELMO, it says, "April 10,  
15 1997."

16 Do you see that?

17 A. Yes.

18 Q. It says, "Scope: This project plan includes,"  
19 and there's a number of assumptions concerning the  
20 submission and approval of the ANDA. Do you see that?

21 A. Yes.

22 Q. When was the ANDA approved for Klor Con M20?

23 A. The ANDA was approved -- that date is escaping  
24 me right now. It was approved in 1998, I believe.

25 Q. I'm sorry, could you speak up?

1           A. It was approved in 1998, I believe.

2           Q. All right. Were you permitted to market this  
3 drug without approval from the FDA, the Klor Con M20  
4 product?

5           A. No.

6           Q. Sir, directing your attention to some of these  
7 dates, there's the date of 6/17/97. Do you see that  
8 line?

9           A. Yes.

10          Q. Just below it, 7/4/97, jury decision. Do you  
11 see that?

12          A. Yes.

13          Q. So, the author of this document thought that  
14 the patent trial would be a jury trial. Do you see  
15 that?

16          A. Yes.

17          Q. All right. And then it says, "September to  
18 November '97, target market introduction, two to four  
19 months for appeal"?

20          A. Yes.

21          Q. Do you have any idea how long it takes for a  
22 patent infringement appeal to occur in the Federal  
23 Courts on average?

24          A. I have no idea.

25          Q. And who was the author of this document, do you

1 know, sir?

2 A. I don't know.

3 Q. Let's grab CX 1100.

4 A. Okay.

5 Q. And go to page 85, please, sir, right where Ms.  
6 Bokat was asking you questions.

7 A. Yes.

8 Q. Okay, and I've got it highlighted on the ELMO  
9 for you.

10 A. Yes.

11 Q. All right. So, this is on page 16085. The  
12 sentences read, "The 20 mEq segment is holding an ASP  
13 of 0.34/tablet verses (sic) the dramatically eroding  
14 ASP in the 8 and 10 mEq markets. K-Dur 20 continues to  
15 market as an innovator," et cetera.

16 Do you see that?

17 A. Yes.

18 Q. That ASP figure was calculated by your company.  
19 Is that right?

20 A. Yes.

21 Q. Do you know at the time that this document was  
22 prepared, December 1997, whether that was, in fact, the  
23 actual selling price to any customer of K-Dur 20?

24 A. No.

25 Q. Would you have had access to actual selling

1 prices for K-Dur 20 at this time period?

2 A. No, and as a matter of fact, as I stated  
3 earlier, when we went out and we actually talked to  
4 customers, we found that in many segments, they were  
5 essentially pricing like a generic, not by their  
6 average selling price, but by the time you take into  
7 consideration the market share programs, their rebates  
8 and so forth, we couldn't compete with that type of  
9 price, and that's what we were told.

10 Q. Would the ASP have included free goods?

11 A. No.

12 Q. Would the ASP have included rebates?

13 A. No.

14 Q. Do you have any idea what Schering-Plough paid  
15 in rebates on K-Dur 20 in the year 1997?

16 A. I have no idea.

17 Q. If the figure was \$9 or \$10 million, would that  
18 surprise you?

19 A. It wouldn't surprise me. I wouldn't know.

20 Q. Would that be a significant figure in the  
21 potassium market?

22 A. Absolutely, more than we could afford.

23 Q. What kind of rebate level were you giving back  
24 to the market in 1997?

25 A. Oh, it was very small.

1 Q. A lot smaller than \$9 million?

2 A. Yes, sir.

3 Q. And none of that would be in this ASP figure.

4 Is that correct?

5 A. That's correct.

6 Q. All right. You were shown -- you were shown a

7 series of documents, we're going to do them very

8 quickly.

9 A. Okay.

10 Q. One's called Niacor-SR Tablets, CX 929.

11 A. Yes.

12 Q. And the question Ms. Bokat asked you was about

13 the perception of liver toxicity. Do you recall that?

14 A. Yes. On what page, may I ask?

15 Q. It's -- she was looking at page 139. It was

16 described as a challenge.

17 A. Oh, yes.

18 Q. Did you believe there were actual serious liver

19 toxicity problems with Niacor-SR?

20 A. No.

21 Q. Did you believe you could overcome this

22 perception among doctors?

23 A. Yes, we had been overcoming that perception

24 among doctors since we first introduced Slo-Niacin.

25 Kos' product, Niaspan, at \$100 million has overcome the

1 perception of hepatotoxicity with extended release  
2 niacin. I have no doubt that with an FDA approved,  
3 clinically proven safe and effective problem, or they  
4 wouldn't approve it, that we would be able to overcome  
5 misperceptions about hepatotoxicity in extended release  
6 niacin.

7 Q. Let me direct your attention to the two  
8 MedProbe exhibits. Do you recall those studies of  
9 Niacor?

10 A. Yes, I do.

11 Q. And sir, you have a background in persuasion.  
12 Is that correct?

13 A. I have a -- yes. My undergraduate degree has a  
14 concentration in rhetoric and persuasion.

15 Q. All right. And since you graduated college,  
16 have you used rhetoric and persuasion in your capacity  
17 as the head of marketing and sales for Upsher-Smith?

18 A. I'd like to think that's contributing to some  
19 of our success, yeah.

20 Q. All right. I'm showing you one of the last  
21 pages of the MedProbe study.

22 A. Yes. Which one, please?

23 Q. The one dated February '97. There are a lot of  
24 bullets I could show you. I am going to cut it short.  
25 This sentence reads -- are you there, top of page 14,



1 Bates numbered 917?

2 A. Just give me a moment, please. Yes.

3 Q. "Nearly all participants expressed an interest  
4 in learning more about niacin."

5 Do you see that?

6 A. Yes.

7 Q. What did you make of that?

8 A. Well, that was encouraging to us. Obviously  
9 they were interested in finding more out about it.

10 Q. Were there all -- other encouraging signs that  
11 this market research pointed to throughout this  
12 document?

13 A. Absolutely. Even the information that the  
14 doctors gave back about the misperceptions about --  
15 niacin is a safe and effective product. That has been  
16 clinically established and proven. It's been used to  
17 lower lipid profiles for over 35 years. That there  
18 would be doctors who had the misperception that it was  
19 not safe and effective only told me I've got my work  
20 cut out for me in terms of the marketing program and  
21 the message we have to craft for them.

22 Q. All right, let's set that aside.

23 This is my final exhibit, Mr. Dritsas. Let's  
24 go --

25 A. Thank you.

1           Q. -- back to tab 10 from your witness binder from  
2 this morning.

3           A. Tab 10 in the fat one or the little one?

4           Q. The big one.

5           A. The big one.

6           Q. Tab 10.

7           A. Yes, sir.

8           Q. The e-mail from John Adams.

9           A. Yes.

10          Q. And I want to direct your attention to the  
11 changes in the quantities demanded for potassium  
12 chloride.

13          A. Yes.

14          Q. Now, sir, Apothecon was using what strategy to  
15 grow its sales in this time period?

16          A. Aggressive pricing.

17          Q. What does that mean?

18          A. That means they were coming out with lower  
19 prices and trying to make it up on volume.

20          Q. And sir, in the time period covered by Mr.  
21 Adams' e-mail, what happened to unit sales to  
22 Apothecon?

23          A. Apothecon unit sales went up.

24          Q. How much?

25          A. 8.7 percent.

1 Q. How does that compare to K-Dur 10?

2 A. K-Dur 10 went up 0.3 percent.

3 Q. In fact, sir, isn't it the case that  
4 Apothecan's sales went up much more than all the other  
5 sellers of potassium chloride in this document?

6 A. Yes.

7 Q. Sir, what does that suggest to you, if  
8 anything, about the price sensitivity of potassium  
9 chloride customers?

10 A. It says, in fact, that the -- there's a great  
11 deal of competitive pressures within this market and  
12 that pricing pressures were evident, and the lower the  
13 pricing strategy in this case with Apothecan, they were  
14 able to gain unit shares at the expense of the other  
15 products competing within that market.

16 MR. GIDLEY: Your witness.

17 JUDGE CHAPPELL: Any recross?

18 MS. BOKAT: Just a couple, Your Honor, if I  
19 may.

20 JUDGE CHAPPELL: Mr. Dritsas?

21 THE WITNESS: Yes, sir.

22 JUDGE CHAPPELL: Do you want to go back to  
23 Minnesota tonight?

24 THE WITNESS: Yes, please.

25 JUDGE CHAPPELL: Proceed.

1 MS. BOKAT: Thank you, Your Honor.

2 RECROSS EXAMINATION

3 BY MS. BOKAT:

4 Q. A few minutes ago you were talking with Mr.  
5 Gidley about Upsher planning to go after the 20 mEq  
6 market.

7 A. Yes, ma'am.

8 Q. And this was in the July 1997 time period.

9 A. Yes.

10 Q. Despite that, the trend has still been to K-Dur  
11 20, away from other potassium chloride supplements,  
12 correct?

13 A. In which context? Units, prescriptions,  
14 dollars?

15 Q. Prescriptions.

16 A. Prescriptions slightly.

17 Q. Dollars?

18 A. Dollars, yes.

19 MS. BOKAT: That's all I have. Thank you, Your  
20 Honor.

21 JUDGE CHAPPELL: Anything further for this  
22 witness?

23 MR. GIDLEY: No further questions, Your Honor.

24 JUDGE CHAPPELL: Thank you, sir. You're  
25 excused.

1 THE WITNESS: Thank you.

2 JUDGE CHAPPELL: Anything further before we  
3 adjourn for today?

4 MR. NIELDS: Nothing from us, Your Honor.

5 MR. CURRAN: It's your pleasure, Your Honor.

6 MS. BOKAT: Nothing from us.

7 JUDGE CHAPPELL: It looks like we lost another  
8 spring-like day.

9 MR. NIELDS: Yes, we did.

10 JUDGE CHAPPELL: We will adjourn until 9:30  
11 tomorrow morning. Thank you.

12 (Whereupon, at 6:00 p.m., the hearing was  
13 adjourned.)

14

15

16

17

18

19

20

21

22

23

24

25

## 1 C E R T I F I C A T I O N O F R E P O R T E R

2 DOCKET/FILE NUMBER: 9297

3 CASE TITLE: SCHERING-PLOUGH/UPSHER-SMITH

4 DATE: FEBRUARY 21, 2002

5

6 I HEREBY CERTIFY that the transcript contained  
7 herein is a full and accurate transcript of the notes  
8 taken by me at the hearing on the above cause before  
9 the FEDERAL TRADE COMMISSION to the best of my  
10 knowledge and belief.

11

12 DATED: 2/22/02

13

14

15

16 SUSANNE BERGLING, RMR

17

## 18 C E R T I F I C A T I O N O F P R O O F R E A D E R

19

20 I HEREBY CERTIFY that I proofread the  
21 transcript for accuracy in spelling, hyphenation,  
22 punctuation and format.

23

24

25 DIANE QUADE

For The Record, Inc.  
Waldorf, Maryland  
(301) 870-8025